Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

On Petition for Writ Of Certiorari
To The Second Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Introductory Statement

Prior to the September 12, 2000 Democratic Primary for United States Senate, we filed a timely designating petition inorder to appear on the ballot as a candidate. Our petition was challenged and we were removed from the ballot. We wanted to continue as a write-in candidate as was our right under New York Election Law. Because of our earlier experience with the New York City Board of Elections in two previous actions, I knew they would not permit it.

On August 21, 2000 I filed CV 00-4964(RR), in the Eastern District of New York. At that time, the only relief sought was that the Court order the defendants to permit write-in voting in that primary. Counsel opposed our request which was subsequently moved to the Southern District where it was denied. The case became 00 CCiv. 6325(GBD) (DFE).

When appealed the order granting summary judgment in my second action, (Docket No.99-9369), the Second Circuit sent a certified question to the New York State of Appeals. In response to our brief to the N.Y. State Court of Appeals, dated January 4, 2001, (a copy is included in the Appendix for Plaintiff-Appellant at pp. 71-81, submitted with our Appeal) the City Board admitted that their interpretation of the relevant election law had been wrong for over 40 years. They were wrong when I filed my first suit in 1994 (94 Civ. 0013 (SS)). They were wrong when I filed my second suit (97 Civ. 9404 (HB)). And they were certainly wrong when I began my third action.

Questions

1. Should public officials be held accountable for the harm caused by their actions and omissions?

2. In 2000, the New York City Board of Elections (the "City Board") knew that primary petitions for an opportunity to ballot by write-in for statewide office are filed with the New York State Board of Elections (the "State Board"), not with the City Board. The City Board also knew that the State Board did not require an opportunity to ballot petition when there were at least two candidates in a statewide primary. Since there were two candidates on the ballot in the September 12, 2000 Democratic Primary for United States Senate, did the City Board's refusal to permit write-in voting, absent the filing of an opportunity to ballot petition, constitute a § 1983 violation under "color of law?"

3. Did the City Board's refusal to permit write-in voting in the September 12, 2000 Democratic Primary for United States Senate, absent the filing of an opportunity to ballot petition, constitute an ultra vires act?

4. Was the plaintiff denied an opportunity to participate in the September 12, 2000 Democratic Primary for United States Senate as a write-in candidate without due process?

5. Knowing, in 2000, that voters in New York State counties outside of New York City were permitted to vote by write-in in the September 12, 2000 Democratic Primary for United States Senate, did the City Board's refusal to permit write-in voting for the plaintiff in that primary constitute an Equal Protection violation?

6. Since the State Board has repeatedly stated that its interpretation of relevant New York State Election Law was always in agreement with the plaintiff's, and since the State Board has acknowledged its obligation under New York State

Election Law to administer elections for statewide positions, should they have acted to prevented the Equal Protection and Due Process violations caused by the City Board's policy?

7. Did the State Board's insistance that it had no authority to tell the City Board to provide for write-in voting in the September 12, 2000 statewide Democratic Primary for United States Senate constitute a § 1983 violation under "color of law?"

LIST OF PARTIES

All parties **do not** appear on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Board of Elections of the City of New York,
and its Commissioners:
Weyman A. Carey, Michael J. Cilmi,
Terrance O'Connor, Ronald J. D'Angelo,
Douglas A. Kellner,Crystal N. Paris,
Gertrude Strohm, Fredric M. Umane,
Vincent J. Velella and Stephen H. Weiner,
represented by:
Ms Julia Steiner, Senior Corporation Counsel
The City of New York Law Department
100 Church Street, Room 6-185
New York, New York 10007
(212) 788-1051

and

The Board of Elections of the State of New York,
and its Commissioners:
Neil W. Kelleher, Carol Berman,
Evelyn J. Aquila and Helen A. Moses Donohue,
represented by:
Mr. Todd D. Valentine Esq.,
New York State Board of Elections
40 Steuben Street
Albany, New York 12207
(518) 474-6367

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, docket number 05-1269-cv, denying plaintiff's appeal was filed September 25, 2005 and is unpublished but is reprinted in Appendix at pages A1-A5.

The Amended Order from United States District Court Judge Daniels for the Southern District of New York docket number 00Civ.6325(GBD) (DFE), dated January 31, 2005 and is reprinted in the Appendix at pages A55-A58.

The order denying Petitioners' request for rehearing en banc was filed Filed December 8, 2005 and is reprinted in the Appendix, at pages A6-A7.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit denying plaintiff's appeal was filed September 25, 2005. In October 2005, petitioner submitted a timely petition for a rehearing en banc. The petition for a rehearing en banc was denied by order, on December 5, 2005 and filed December 8, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution

Article I Section 4 (1)"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof;..."

Amendment XIV "... No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

-STATUTES-

28 USC Sec. 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State

or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

NEW YORK STATE CONSTITUTION

Article 1

Sec. 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof...

NEW YORK STATE ELECTION LAW

§ 6-144. "Nominating and designating petitions and certificates; place for filing." provides (in relevant part):

> Petitions, certificates and minutes specified in this article shall be filed in the office of the Board of Elections of the county, except as follows:for an office or position to be voted for wholly within the city of New York, in the office of the Board of Elections of that city; for an office or position to be voted for in a district greater than one county, or portions of two or more counties, in the office of the state board of elections; for a village office to be filled in a village election not conducted by the board of elections, in the office of the village clerk. ...

Section 6-164, " Primary, uncontested; opportunity to ballot," provides:

> Enrolled members of a party entitled to vote in the nomination of a candidate for public office or the election of a candidate for party position in a primary election of such party, and equal in number to at least the number of signers required to designate a candidate for such office or position may file with the officer or board with whom or which are filed designating petitions for such office or position a petition requesting an opportunity to write in the name of a candidate or candidates, who need not be specified, for such office or position. Upon the receipt of such a petition, such office or position shall be deemed contested and the primary ballots of the party shall afford an opportunity to vote thereon.

STATEMENT OF THE CASE

This action was initiated in August 2000 in the Eastern District as CV 00 4964 (RR). At that time, the only relief sought was an injunction ordering the New York State Board of Elections (the "State Board") and the New York City Board of Elections (the "City Board") to respect my legal right to participate in the September 12, 2000 Democratic Primary for U. S. Senate as a write-in candidate.

In response to motion by the defendants, the case was transferred to the Southern District where injunction was denied. The case became docketed 00 Civ 6325 and was assigned to Judge Daniels. In addition to a correction of the City Board's policy, we now sought damages. Case was dismissed by Judge Daniels in January, 2005. We appealed.

This was my third action against the City Board and

my first to include the State Board. Although all three actions centered around the City Board's refusal to permit me to seek office as a write-in candidate, there were important differences between them.

My first action, 94 Civ 0013 (SS), concerned a local primary and election in only one year, 1993. Hon. Judge Sotomayor dismissed my complaint in 1996, ruling that I was unable to prove that my rights were violated deliberately. However, in an earlier Opinion and Order, dated March 24, 1995, the Court had denied a motion to dismiss, suggesting the defendants consider a 1963 Opinion from the New York State Attorney General's office which seemed to support my claim.[1]

My second action, 97 Civ 9404 (RMB), the pattern of continuing denial of my right to participate in contested primaries as a write-in candidate and voter leading up to the September 1997 Democratic Primary for Bronx Borough President. Although Hon. Judge Berman dismissed this complaint in September 1999, we appealed. In order to determine meaning of the relevant state law, the Second Circuit sent a certified question to the New York State Court of Appeals.

In their brief to the New York State Court of Appeals, dated January 4, 2001[2] , the City Board admitted that their policy regarding write-in voting in contested primaries had been wrong for over 40 years, making a ruling by the New York State Court of Appeals unnecessary. As a result, the Second Circuit vacated Hon. Judge Berman dismissal and we infact went to trial in July 2001. That I lost the trial is irrelevant to my current case.

[1] A copy of this Opinion and Order appears in Appellant's Court of Appeals Appendix at A45-A70.

[2] A copy of their brief appears in Appellant's Court of Appeals Appendix at A71-A81.

My current action concerns my attempt to run in the September 2000 Democratic Primary for the office of United States Senator. Although this action was begun before the defendants admitted that their interpretation of relevant NYS Election Law had been wrong for over 40 years, this case is significantly different inorder to warrant a different outcome.

At the time this action was initiated, both the City Board and the State Board were aware that all qualifying petitions for statewide office are filed with the State Board, not with the City Board. Further, both parties knew at that time, that the State Board did not require an additional opportunity to ballot petition before offering write-in voting in a contested primary. Clearly, the City Board had no authority to insist that a petition was necessary in a primary over which they had no jurisdiction.

The Court was in error when my complaint was dismissed and the Second Circuit was in error when my appeal was denied. My current action is sufficiently different from my two earlier actions to merit a trial to determine whether the defendants are infact culpable. We should be permitted to go trial and present our case to a jury as we were permitted to do after Hon. Judge Berman's 1999 dismissal was reversed in 2001.

REASONS FOR GRANTING THE PETITION

I. The decision of the Second Circuit conflicts with this Court's decision in *U.S. V. CLASSIC*, 313 U.S. 299.

A. In *U.S. V. CLASSIC*, 313 U.S. 299 (1941), the Supreme Court held that:

> [T]he right of the voters at the primary to have their votes counted is, as we have stated, a right or privilege secured by the Constitution ... The alleged acts of

> appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the [313 U.S. 299, 326] ballots, to record the result of the count, and to certify the result of the election. Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law. Ex parte Virginia, 100 U.S. 339 , 346.

In determined that the Federal Courts have jurisdiction in federal elections and primaries for Congress and U.S. Senate, the Supreme Court also found that among rights and privileges secured by the Constitution and Laws of the United States, are:

(1) the right of qualified voters who cast their ballots in the primary election to have their ballots counted as cast for the candidate of their choice;

(2) the right of the candidates to run for the office of Congressman and Senator and to have the votes in favor of their nomination counted as cast;

(3) the protection of these rights from violations under color of law; and

(4) where State Law provides for write-in voting, that too is protected by the Constitution and Laws of the United States.

Because the primary in this action is the September 12, 2000 Democratic Primary for the Federal office of U. S. Senator our right to participate as a write-in candidate was protected.

B. When in its September 29, 2005 Summary Order (A1-A5), the Second Circuit cites *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1,8 (1944) stating:

> "[U]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'"The "determinative threshold question" is thus whether the actions of City Board and its Commissioners were "intentional." *Shannon v. Jacobowitz*, 394 F.3d 90, 93 (2d Cir. 2005).(A3)

We can show that the defendants were aware at the time we requested injunctive relief in August of 2000, that they were acting outside their legal authority when they made their "erroneous" interpretation.

> The Second Circuit was mistaken when it said: [P]laintiff asserts that City Board's delay in changing its legal position on write-in voting constitutes a "willful and deliberate choice" to deny plaintiff his right to seek public office and his right to cast a write-in vote. However, while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation, plaintiff cannot establish that defendants intentionally chose this erronous interpretation *for the purpose of discriminating against write-in voters*.(A3-A4)

In discussing the Due Process and Equal Protection elements of my complaint, Magistrate Eaton stated that "It is undisputed that the City knew all along that its interpretation differed from the State's." (A41-A42)

Clearly, this means that the City Board knew at the time we filed for injunctive relief in August 2000, CV 00 4964 (RR), that the State Board did not require the opportunity to ballot petition the City Board claimed was necessary. The City Board also knew that according to NYS Election Law § 6-144, petitions for statewide office are filed with the State Board, not with the City Board.

When the City Board's insisted, in 2000, that write-in voting would not be offered, absent an "opportunity to ballot" petition, they were not saying that said petition had to be filed with the City Board, but rarher with the State Board even though the State Board did not require it. They were clearly acting under color of law, 42 § 1983.

II. The decision of the Second Circuit conflicts with an earlier ruling by the Second Circuit in *Williams v. Salerno*, 792 F.2d. 323, 326 (2d Cir. 1986)

In *Williams*, the Second Circuit had found that irreparable harm is established if a party is deprived of the right to vote (noting that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon"). In addition to having been denied my legal right to vote by write-in, we were also denied our right to participate as a candidate. While the defendants admitted, in 2001, that their interpretation of relevant election law had been wrong for over 40 years, the harm had been done and cannot be undone.

III. The Second Circuit's support of the District Court's ruling is in conflict with this Court's rulings in both *Monell v. Department of Social Services*, 436 U.S. 658, 98 Sup.Ct. 2018 (1978) and in *Pembaur v. City of Cincinnati*, 106 Sup.Ct. 1292, 1300 (1986).

In *Monell*, the Supreme Court found that municipalities and public officials can be held accountable under 42 § 1983 for constitutional rights violations resulting from the department's official policy. In my case, my rights were violated by the official policy set by both the City Board with its commissioners and the State Board with its commissioners.

In *Pembaur*, the Supreme Court found that liability under 42 § 1983 could be imposed on officials who were responsible for establishing the "final" official policy with respect to the activity in question. The Court noted that municipal liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question. *Pembaur* is also significant because it shows that liability can attach to even a single decision to take unlawful action in accordance with official policy set by even a single policy maker.

At the time we began this action, in August of 2000, the defendants were presented with two distinct choices. First, they could have complied with their obligation under NYS Election Law and granted me the less than three weeks that remained before the then upcomming September 12, 2000 primary, thereby avoiding this action. Or, second, they could continue their official policy whereby misinterpreting NYS Election Law they continue to deny me my legal right to seek public office as a write-in candidate. By choosing the second, they confirmed their official policy.

In accepting the lower court's ruling, the Second Circuit makes no determination as to the merits of the "color of law" issue that lies at the heart of my § 1983 action. If the City Board and its menbers knew that "opportunity to ballot" petitions are filed with the State Board and if we can show that they knew that State Board did not require these petitions in an already contested primary, then we can establish that their official policy was under of "color of law" and in deliberate violation of our constitutionally protected right to vote and to seek public office.

IV. Our Due Process Claim against the City Board should stand.

The Second Circuit says

"Similarly, "the due process clause is implicated by intentional state action." *Shannon*, 394 F.3d at 97 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)."[T]he due process clause . . .offer[s] no guarantee against errors in the administration of an election." *Powell*, 436 F.2d at 88. Plaintiff asserts that "City Commissioners deliberately denied to me and to other [D]emocratic voters our legal right to vote by write-in." However, as the magistrate judge pointed out, "although the Board of Elections' interpretation of New York Election Law was erroneous, it was rational, and clearly not arrived at with the intent to deprive any one person of the right to vote." Consequently, plaintiff's due process claims against City Board and its Commissioners must also fail. (A4)

Since it is agreed that in 2000, the defendants were presented with two options, one being to comply with their legal obligation and permit me to run as a write-in candidate, and the other being the continued their official policy of not providing write-in voting in contested primaries, absent an "opportunity to ballot" petition. They chose the latter.

If the defendants' actions and omissions were rational as the magistrate judge claims, then their misinterpretation of New York Election Law was merely erroneous and the due process claims against the City Board and its Commissioners should fail.

The question that needs to be addressed then is: Was their conduct rational? The answer clearly is no.

In discussing a memo from the New York City

Campaign Finance Board, Magistrate Eaton offered the following:

> [T]here is no evidence that any of the defendants saw this memo. Moreover, it does not reflect any awareness of Gelb, or any intent to deprive anyone else from running as a write-in candidate. It does reflect the discrepancy between the State and City practices, but that discrepancy has never been in dispute. The dispute is over whether that discrepancy had a discriminatory effect or purpose; this memo does not bear on that issue at all. Thus, even if it were admissible, this memorandum does not help Gelb, as the party opposing a motion for summary judgment, to meet his burden to "show a genuine issue by presenting evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existance of that [required] element at trial." *Cornett v. Sheldon*, 894 F.Supp. 715, 724, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986) (emphasis added).(A33)

By acknowledging that there is a discrepancy in the interpretation of relevant election law between the State Board and the City Board, Magistrate Eaton is acknowledging the fact that the State Board did not require an "opportunity to ballot" petition before permitting write-in voting in a contested statewide primary. Further, since any petitions for statewide office are filed with the State Board and not the City Board, has no authority in statewide primaries. Clearly, because the City Board knew that petitions for statewide office are filed with only with the State Board, and they knew that the State Board did not require an "opportunity to ballot" petition before permitting

write-in voting in a contested statewide primary, the City Board's decision to withhold the access to write-in voting in the September 2000 Democratic Primary for U.S. Senator was not rationally arrived at. Their misinterpretation of the relevant election law was not merely erroneous and should not be excused.

Regarding my appeal from the ruling in my previous action, 97 Civ 9404(RMB), the Second Circuit has said " In light of the repeated refusals of the City Board to afford Gelb (and others) write-in voting privileges in primary elections, it may well be that the Board engaged in arbitrary, purposeful and intentional discrimination. This does not appear to be a case of mere 'unintended irregularities.' *Gold*, 101 F.3d at 800.[3] "(A40) As a result of the Second Circuit's ruling, Judge Berman's order was vacated and we went to trial. That I lost the trial is irrelevant.

While the issues in my current case are similar to my previous actions, there is one significant difference. The office in question is statewide, not local. The City Board's conduct cannot be excused as mere error when it can be shown that they had no right to make any determination. We are entitled to present our facts at trial.

Our Due Process Claim should stand.

V. Our Equal Protection Claim against the City Board should stand.

The Second Circuit has basically accepted Magistrate Eaton's Report and Recommendation. In order to understand the Equal Protection claim against the City Board. The Magistrate says:

[3] *Gelb v. The Board of Elections of the City of New York, et al*, (2000) 2d Cir. Slip Opinion, pg. 5308 Appeals Appendix p.40

> [I]n order to establish any violation of Equal Protection Clause, Gelb must show that the City Board or the City Commissioners' conduct was "purposeful" -- purposeful in the sense that they intended to discriminate against Gelb or a class of persons of which Gelb is a member. See *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401 (1944) ("the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."); *Gold v. Feinberg*, 101 F.3d 796, 798 (2d Cir. 1996), citing *Powell v. Power*, 436 F. 2d 84 (2d Cir. 1970) (A 30)

Can we demonstrate that an element of intentional or purposeful discrimination is present in the City Board's conduct complained of?

The defendants were aware that the Federal Office in question in the September 12, 2000 Democratic Primary was United States Senator, a statewide primary. They were aware that "opportunity to ballot" petitions for write-in voting for statewide office is filed with the State Board, not the City Board. Further, they were aware that since the primary in question was contested, the State Board did not require that an "opportunity to ballot" petition be filed before permitting write-in voting.

Since the City Board can not offer any legitimate justification for their "erroneous" interpretation of relevant election law, their conduct can only be seen as purposful in the sense that they intended to discriminate against my write-in candidacy in the September 12, 2000 Democratic Primary for United States Senator.

When the Second Circuit says

> [P]laintiff asserts that the City Board's delay in changing its legal position on write-in voting constitutes a ""willful and deliberate choice"" to deny plaintiff his right to seek public office and his right to cast a write-in vote. However, while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation, plaintiff cannot establish the defendants intentionally chose this erroneous interpretation *for the purpose of discriminating against write-in voters*."(emphasis included) (A 3)

the Court misapprehended the nature of my complaint. It is not the defendants' delay in changing their legal position on write-in voting that constitutes a "willful and deliberate choice."

Rather, there were two separate reasons that speak to their actions being willful and deliberate.

First, their refusal, under color of law, to respect my legal right to participate in the September 12, 2000 Democratic Primary for U. S. Senate constituted a "willful and deliberate choice." In August 2000, when I moved for injunctive relief to compel the City Board provide write-in voting, the City Board already knew that (1) primary petitions for the statewide race for U. S. Senate were filed with the State Board, not with the City Board; and (2) they also knew the State Board did not require an additional opportunity to ballot petition in a contested primary before offering write-in voting. Clearly, the City Board had no legal right to its own interpretation of relevant election law in a statewide race.

Second, when the City Board admitted in their 2001 brief to the New York State Court of Appeals (A71-A81),

that their policy regarding write-in voting in primaries had been wrong for over 40 years, they cited two reasons for their reversal. The City Board stated:

> ... The origin of the "opportunity to ballot petition" and the legislative history of Election Law sections 6-164 and 6-160(2) demonstrate that an opportunity to ballot petition is applicable only in uncontested primaries where, but for the filing of an opportunity to ballot petition, no balloting would take place. Thus, in contested primaries where balloting will take place, write-in voting should be made available to enrolled party members.[4]

These two facts were not newly discovered by the defendants. Judge Sotomayor had suggested that the defendants consider these two items in her 1995 Opinion and Order in my first complaint, 94 Civ. 0013(SS) (Appeals Appendix p45-p70).

These two facts were not newly discovered by the defendants. Judge Sotomayor had suggested that the defendants consider these two items in her 1995 Opinion and Order in my first complaint, 94 Civ. 0013(SS) (Appeals Appendix p45-p70).

Further, that defendants' intent to discriminate against me as a write-in candidate can be seen in their misstatement of facts in "Defendant City Board of Elections' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction" CV-00-4964 (RR) (Appeals Appendix p87-p96). On page 4 of this Memorandum (Appeals Appendix p91), defendants make a number of false and misleading statements upon which the Court later relied.

[4] Respondents' Brief to NYS Court of Appeals, "Statement of Position" page 5, ¶2 (Appeals Appendix p.77)

1. Page 4, ¶2 (A91) begins: "Because of the number of political parties in New York State and the number of public offices and party positions ordinarily at stake in a primary election, the voting machines utilized by the City Board of Elections are not capable of providing write-in slots for every office and position in a typical primary, such as the one which will be held on September 12, 2000."

This statement is misleading and false for the following reasons:

If the voting machines were not capable, as the defendants claimed, of providing write-in slots for every office and position in a typical primary, then there would also be insufficient space on the ballot for the offices and party positions. NYC voting machines are designed for use in no more than four primaries. This can be seen in the excerpt from the Voting Machine Maintenance Manual, Section Eleven, page 1(Appeals Appendix p.137). The voting machines have eight columns that for primaries are connected in sets of two. There are 40 lines in each column and a corresponding 40 write-in slots. Since the voting machines were used in the September 12, 2000 primary, there was sufficient ballot space for all the public offices and party positions. The 40 write-in slots would have been sufficient.

Clearly, this statement was intended to mislead the Court.

2. Page 4, ¶2 (Appeals Appendix p.91) continues: "Even if the voting machines had such a capability, the ballots would have to be completely reconfigured to permit write-in voting for all public offices and party positions. Such a reconfiguration could not be performed without the rotation of the candidates being affected, which would result in a violation of Election Law §7-116(6)." This statement is

false and misleading because no reconfiguration was necessary. There is only one write-in slot available for *each office and each position* on the ballot. The number of candidates for each primary office or position and the order in which the candidates appear is irrelevant. Clearly this statement was also intended to mislead the Court.

3. The fact that the defendants would fabricate these two superficial and nonrational reasons for withholding my right to participate as a write-in candidate clearly illustrates their willful and deliberate intent. Their actions and omissions were not due to some rationally arrived at error.

Our Equal Protection claim is valid and should be permitted to proceed.

VI. The injunctive relief requested should be granted because the annual modification of the N.Y.S. Election Law in order to permit the counting of write-in votes up to 15 days after the primary is another deliberate violation of Equal Protection.

In a primary where you have multiple (two or more) designated candidates for an office and an unknown number of write-in possibilities, if no candidate obtains a plurality of at least 40%, there will have to be a runoff primary between the two candidates with the highest number of votes. NYEL § 8-100(1)(b)

If one of the two candidates for the runoff were a write-in candidate, no one would be aware of this fact for up to 15 days. This would be further complicated by the fact that NYEL § 8-100(1)(b) states: "In the event a run-off primary election is required in the city of New York, it shall be held on the second Tuesday next succeeding the date on which the initial primary election was held."

Conceivably, a write-in candidate as well as the qualified voters would not know that the write-in candidate

qualified for the run off until after it was held.

Also, the defendants failed to demonstrate any real need to change the location and time of the counting of the write-in ballots from public view, at the polls, to some warehouse 15 days later.

VII. The State Board violated my rights under Color of Law.

A. The following facts are not in dispute:

1. The elective office in question is the federal office of U. S. Senator.

2. The State Board was aware of the fact that designating petitions for statewide primaries are filed with the State Board, not with the City Board.

3. The State Board did not require an opportunity to ballot petition prior to permitting write-in voting in a contested statewide primary.

4. The State Board was aware of the City Board's claim that an opportunity to ballot petition was required prior to permitting write-in voting even in a contested statewide primary.

B. On page 2, ¶2 of its "Memorandum of Law in support of Defendant, State Board's Motion for Judgment on the Pleadings", dated April 24, 2001 (A100), defendants say "...The State Board administers the access to the ballot for statewide office. Election Law §6-144." They clearly avoided their administrative responsibility in 2000.

When we began this action in the Eastern District as "CV 00 4964"(RR) (A82-A86) the State had a responsibility to inform the Court that the City Board had no legal right to claim an opportunity to ballot petition was necessary in a statewide race.

They ignored their obligation, thereby causing irreparable harm and violating my rights under color of law.

VIII. For the purposes of my action, the City Board and its Commissioners and the State Board and its Commissioners are joint tortfeasors and are both jointly and severally liable for the injuries we suffered.

The Second Circuit was incorrect "In concluding that the actions of the City Board and its Commissioners did not violate the Equal Protection or Due Process Clauses, it follows that the inaction of the State Board and its Commissioners, in supervising their conduct, also did not violate these constitutional provisions. See *Bass v. Jackson* 790 F.2d 260, 263(2d Cir. 1986) (affirming dismissal of § 1983 claim despite "allegations of deliberate indifference" because *pro se* plaintiff "does not connect the failure to [act] to any of the ...defendants")" (A4)

Clearly, we did connect the actions and omissions to the various commissioners on the two Boards. When the City Board and the State Board set their policy, it was with the joint participation and consent of their respective Commissioners. No Commissioner on either Board was ever shown to be in disagreement with their Board's policy.

The City Board cannot show that their "erroneous" interpretation of New York Election Law was rationally arrived at and we can show that they were aware that they had no right to make any determination regarding a statewide race.

During our initial action in the Eastern District "CV 00 4964"(RR), the State Board had an opportunity to prevent the irreparable harm that ultimately occurred as a result of their failure to act.

While the Second Circuit correctly says "Because the states traditionally have authority over their own elections and because the Constitution contemplates that authority, courts have long recognized that not every state election

dispute implicates federal constitutional rights." *Shannon*, 394 F.3d at 94 (internal quotations omitted) (A4) the quotation is irrelevant because in *U. S. v. CLASSIC*, 313 U.S. 299 (1941) the Supreme Court determined that the Federal Courts have jurisdiction in federal elections and primaries for Congress and U.S. Senate.

Further, footnote 2, attached to the above quote says "Moreover, as plaintiff conceded in his reply brief, his claims against the State Board for monetary damages are barred under the Eleventh Amendment. *See Feingold v. New York*, 366 F.3d 138, 149(2d Cir.)" is correct only in part. We conceded only that the State is immune from damages.

The Commissioners, however, have no immunity because they were not acting on behalf of the State when under color of law, they supported the right of the City Board to interpret the relevant Election Law differently from the State Board in a statewide primary.

State officials can be sued for damages when acting in their "official capacity."*Hafer v. Melo* 112 Sup. Ct. 358 (1991) Further, in *Pembaur*, liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Irving A. Gelb
8800 Boulevard East, apt. 3M
North Bergen, New Jersey 07047
(646) 431-8999

March 7, 2006

(2)

Supreme Court, U.S.
FILED

051161 MAR 7 - 2006

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals for the Second Circuit

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

File stamp: "UNITED STATES COURT OF APPEALS, Second Circuit, Filed SEPT. 29, 2005 Roseann B. MacKechnie Clerk"

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 29th day of September, two thousand and five.

Present: HON. ROGER J. MINER,
HON. RICHARD C. WESLEY
Circuit Judges.
HON. JED S. RAKOFF,
District Judge.[1]

IRVING A. GELB,

Plaintiff, Appellant

v. (05-1269-cv)

Board of Elections of the New York City , et al

[1] The Honorable Jed S. Rakoff, United States District Court for the Southern District of New York, sitting by designation.

and

The New York State Board of Elections, et al

Defendants-Appellees

Appearing for Plaintiff-Appellant:	Irving A. Gelb, pro se, Bronx, New York
Appearing for Defendants-Appellees Board of Elections of the City of New York and its Commissioners:	Julie Steiner, Senior Counsel, Appeals Division, the City of New York Law Dept., New York, New York
Appearing for Defendants-Appellees Board of Elections of the State of New York and its Commissioners:	Todd D. Valentine, Special Counsel, New York State Board of Elections, Albany, New York.

Appeal from the United District Court for the Southern District of New York (Daniels,J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be AFFIRMED.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues. Plaintiff brings this section 1983 action alleging that defendants, Board of Elections of the City of New York ("City Board"), Board of Elections of the State of New York

("State Board"), individual commissioners of the City Board ("City Commissioners"), and individual commissioners of the State Board ("State Commissioners"), violated the Equal Protection and Due Process Clauses of the United States Constitution and committed fraud and ultra vires acts under New York state law. Plaintiff alleges that defendants committed these violations by denying him and other similarly situated voters the legal right to cast a write-in vote during the 2000 Democratic Primary for the United States Senator and by failing to provide information and instructions on write-in voting. Plaintiff also requests a mandatory injunction on the basis that defendants violated the Equal Protection Clause by failing to count write-in votes "at the polls" at the same time as other votes. The district court, adopting the recommendation of the magistrate judge, granted summary judgment for defendants and denied plaintiff's motion for a mandatory injunction. After conducting de novo review, we now affirm the district court's grant of summary judgment for defendants and its denial of injunctive relief.

"Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'" *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1,8 (1944). The "determinative threshold question" is thus whether the actions of City Board and its Commissioners were "intentional." Shannon v. Jacobowitz, 394 F.3d 90, 93 (2d Cir. 2005). Plaintiff asserts that City Board's delay in changing its legal position on write-in voting constitutes a "willful and deliberate choice" to deny plaintiff his right to seek public office and his right to cast a write-in vote. However, while plaintiff has established that City Board deliberately chose to maintain its erroneous interpretation,

plaintiff cannot establish that defendants intentionally chose this erronous interpretation *for the purpose of discriminating against write-in voters*. Plaintiff's claim for injunctive relief must also fail because, without demonstrating intentional discrimmination, plaintiff has failed to make "a clear showing that the moving party is entitled to the relief requested." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995).

Similarly, "the due process clause is implicated by intentional state action." *Shannon*, 394 F.3d at 97 (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986). "[T]he due process clause . . .offer[s] no guarantee against errors in the administration of an election." *Powell*, 436 F.2d at 88. Plaintiff asserts that "City Commissioners deliberately denied to me and to other [D]emocratic voters our legal right to vote by write-in." However, as the magistrate judge pointed out, "although the Board of Elections' interpretation of New York Election Law was erroneous, it was rational, and clearly not arrived at with the intent to deprive any one person of the right to vote." Consequently, plaintiff's due process claims against City Board and its Commissioners must also fail.

In concluding that the actions of City Board and its Commissioners did not violate the Equal Protection or Due Process Clauses, it follows that the inaction of State Board and its Commissioners, in supervising their conduct, also did not violate these constitutional provisions. See *Bass v. Jackson*, 790 F.2d 260, 263 (2d. Cir. 1986) (affirming dismissal of section 1983 claim despite "allegation of deliberate indifference" because pro se plaintiff "does not connect the failure to [act] to any of the . . . defendants"). "Because the states traditionally have authority over their own elections and because the Constitution contemplates that

authority, courts have long recognized that not every state election dispute implicates federal constitutional rights." *Shannon*, 394 F.3d at 944 (internal quotations omitted.) [2]

Finally, we decline to exercise supplemental jurisdiction over plaintiff's fraud and ultra vires claims because all of plaintiff's federal claims have been dismissed. "[I]n the usual case in which all federal-inlaw claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine - judicial economy, convenience, fairness, and comity - will point toward declining to excercise jurisdiction over the remaining state-law claims." *Valencia ex rel. Franco v. Lee*, 316 F.3d,299, 305 (2d Cir. 2003) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). "Certainly, if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *Castellano v. Bd. of Trs. of the Police Officers' Variable Supplements Fund*, 937 F.2d 752, 758 (2d Cir. 1991) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)).

Accordingly, for the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

For the Court, Roseanne B. MacKechnie, Clerk

s/ Lucille Carr

[2] Moreover, as plaintiff concedes in his reply brief, his claims against State Board for monetary damages are barred under the Eleventh Amendment. See Feingold v. New York, 366 F.3d 138, 149 (2d Cir. 2004).

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York 10007

Roseann B. MacKechnie
Clerk
file stamp: "UNITED STATES COURT OF APPEALS, Second Circuit, Filed December 8, 2005 Roseann B. MacKechnie Clerk"

Date:	12/5/05
Docket Number:	05-1269-cv
Short Title:	Gelb v. New York State Board of Elections
DC Docket Number:	00-cv-6325
DC:	SDNY (New York City)
DC Judge:	Honorable George Daniels

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall U.S. Courthouse, Foley Square, in the City of New York, on the 8th day of November two thousand five.

Gelb v. Board of Elections

A petition for a panel rehearing and a petition for rehearing en banc having been filed herein by the Irving A. Gelb Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
s/ Tracy W. Young
Motion Staff Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

---

00 Civ. 6325 (GBD) (DFE)

REPORT AND RECOMMENDATION TO JUDGE DANIELS

DOUGLAS F. EATON, United States Magistrate Judge.

On February 24, 2004, pro se plaintiff Irving A. Gelb moved for a "Mandatory Injunction." (Docket Item #35.) Gelb asks our court to

> issue an ORDER requiring that the New York City Board of Elections (the Board) count at the polls all write-in votes cast in all primary and general elections starting with the September 2004 primary.

(Id., aff. at p.1; emphasis added.)

On March 10, Assistant Corporation Counsel Paul Marks served an opposing memorandum of law. On March 16, Gelb served a reply("Reply"). This motion is in furtherance of Gelb's third[1] law suit against the New York City Board of Elections, filed in 2000. All three lawsuits attacked the

[1] The first two actions were *Gelb v. Board of Elections in City of New York*, 950 F. Supp. 82 (S.D.N.Y. 1995), aff'd. 125 F.3d 843 (2d Cir. 1997) ("*Gelb I*") and *Gelb v. Board of Elections in City of New York*, 2002 WL 31018573 (2d Cir. Sept. 10, 2002) ("*Gelb II*").

Elections, filed in 2000. All three lawsuits attacked the City's practices regarding write-in voting, particularly in contested primary elections. The basic issue in all three cases has been whether or not the City is required to provide a mechanism for write-in voting even if no one has filed a petition for "opportunity to ballot." But in 2001 the City changed its position on this issue and its position is now consistent with Gelb's. See *Gelb v. Board of Elections of City of New York*, 2001 WL 327113 (2d Cir. April 4, 2001).

In his current motion, Gelb voices a different complaint. He alleges that counties outside the City count their write-in votes "at the polls," by which he means "at the poll sites and on the very night of the voting." (For the purposes of this motion, I will assume that this allegation is true.) He complains that the City counts its write-in votes several days later. He says the City's practice was contrary to the former version of New York State Election Law ("NYEL") § 9-102(2)(a), the version that existed prior to 2001. Starting in 2001, the New York State Legislature has enacted, each year, an amended version of § 9-102(2)(a), each time effective for one year. The present version reads as follows (with my emphasis):

> § 9-102 Canvass; general provisions for
>
> (2)(a) [Eff. until July 10, 2005 ...] If the voting machine records write-in votes on a register or roll in a separately sealed compartment, a board of elections may, by resolution adopted at least thirty days before the date of an election, determine to canvass the write-in votes cast for each office on the write-in register or roll either at the time of the recanvass conducted pursuant to section 9-208 of this article or ... at the close of the polls.

The statute gives each board of elections a choice as to the

time when it will count the write-in votes. If the City "chooses the time of the recanvass conducted pursuant to section 9-208," [2] then the City will simply be following the law of New York State.

Gelb claims that the Equal Protection Clause has been violated each time the Legislature has enacted the present version, and will be violated each time the City Board exercises its statutory option to canvass the write-in votes up to 15 days after the voting. Gelb writes:

> The changes to NYEL § 9-102(2)(a) as described by counsel are clearly in violation of Equal Protection because they grant to each board of election the option of either (1) canvassing write-in votes at the close of the polls; or (2) counting the write-in votes during the recanvass conducted pursuant to § 9-208. This means that the voters in some counties will know the the write-in vote on primary election night while those within New York City will need to wait eight days [or up to 15 days]. For the change to be fair, no vote count [not even the vote count for the candidates on the ballot] should be released until all votes are counted.

(Reply, p.2.) But § 9-102 gives all local boards of elections throughout New York State the same two alternatives -- it does not treat similarly situated groupes differently.

---

[2] § 9-208 provides in pertinent part:

> 1. Within fifteen days after each general, special or primaary election ..., the board of elections ... shall in each county using voting machines, ... recanvass the vote thereon ... The said Board or committee shall during such time, make a recanvass of any absentee and military, ... emergency and write-in ballots which were canvassed at the polling places on election night and delivered to the board of elections by the person filing returns.

Gelb further argues that the new statute "adversely affects a fundamental right"[3] and should be judged by a "strict scrutiny" test, which would require the state to establish that it has "a compelling interest justifying the law and [that] the distinctions created by law are necessary to further some governmental purpose." (Reply, p.2.) But this case does not call for a "strict scrutiny" analysis. As Judge Lynch explained in a recent voting case:

> ... Since every state election law inevitably imposes some burden upon the right to vote and the attendant First and Fourteenth Amendment associational rights, subjecting every voting regulation to strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433, 112 S.Ct. 2059.
>
> ... Two distinct but overlapping analytical framworks exist for distinguishing permissable regulation of the

[3] In Gelb's view, the "fundamental right" "adversely affected" is a voter's right to have a "vote cast by write-in for an undesignated candidate [be] equal in weight and stature to a vote cast for a designated candidate appearing on the ballot." (Reply p.1.) At p.2 of his Reply, he says: "The original intent of the law [former § 9-102] was to bestow equal status to all votes, whether cast by write-in or otherwise. Clearly, if the right to vote by write-in in a contested primary is a funamental right, so too is the right to have the write-in vote counted at the polls with the other votes."

However, Gelb cites no authority for his premise that the right to vote by write-in in a contested primary is a "fundamental right" in a Constitutional sense. This right is a creature of state statute. Moreover, the write-in vote does not have less "weight" because it was cast by write-in. Regardless of whether it is "counted" immediately or 15 days later, a write-in vote has the same weight as any other vote in the final official total. This situation is similar to the absentee ballot situation, where the canvass is not completed until some days after the election. See NYEL § 9-208 and § 9-209.

electoral process from unconstitutional infringements of First and Fourteenth Amendment rights...

Challenges to state electoral regulations based directly on First Amendment and Fourteenth Amendment associational rights and the right to vote are analyzed under a balancing test that modulates the degree of scrutiny to the severity of the burden imposed. When the state laws subject speech, association, or the right to vote to severe restrictions, the regulations must be narrowly drawn to advance a state interest of compelling importance. *Lerman v. Bd. of Elections*, 232 F. 3d 135, 145 (2d Cir. 2000) (citation omitted). The severity of the burden imposed depends both on the character of the restrictions themselves, and on the nature of the right burdened. For example, even the smallest restriction may be regarded as severe if it burdens "core political speech" by "inhibit(ing) communication with voters about proposed political change." *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 192 & n. 12, 119 S. Ct. 636, 142 L.Ed. 2d 599 (1999); se also *id.* at 208, 119 S.Ct. 236 (Thomas, J., concurring)....

In contrast, lesser restrictions... on the right to vote call for a correspondingly less exacting review. A state's important regulatory interests are sufficient to justify election laws imposing lighter burdens that do not impinge on core political speech and only regulate "the mechanics of the electoral process."

* * *

State election laws may also be challenged under the

> Equal Protection Clause of the Fourteenth Amendment. See *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); *Anderson*, U.S. at 787, n.7, 103 S.Ct. 1564. It is axiomatic that the Equal Protection clause prohibits only "invidious" discrimination, and does not call into question "every minor difference in the application of laws to different groups." *Williams*, 393 U.S. at 30, 89 S.Ct. 5.

The Green Party of the State of New York v. Weiner, 216 F.Supp.2d 176, 187-88 (S.D.N.Y. 2002)(some citations omitted).

There are two prerequisites for a preliminary injunction that seeks to stay "governmental action taken in the public interest pursuant to a statutory or regulatory scheme;" they are (1) a showing of irreparable harm and (2) a showing of likelihood of success on the merits. *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 923 (2d Cir. 1997). Moreover, Gelb's notice of motion seeks a "Mandatory Injunction," and therefore must show a "clear" or "substantial" likelihood of success. *Jolly v. Coughlin*, 76 F. 3d 468, 473 (2d Cir. 1996).

As to the first prerequisite, Gelb has not made a showing of irreparable harm. Pursuant to the statute, there can be a 15 day delay before anyone knows the final write-in total. This delay would seem to affect everyone equally, but Gelb argues:

> Further, in the event that no candidate in a contested primary obtains a 40% plurality, there must be a run-off primary between the two leading candidates. This would be a second contested primary and write-in voting would again be permitted. Not counting the write-in votes at the polls, would favor the designated candidates and give them an unfair advantage.

(Am. Cplt. p.5.) He does not explain what that "unfair advantage" would be. He may envision a close 3-way race between two designated candidates and a write-in candidate. During part of the time between the first primary and the run off primary, the uncertainty might diminish effectiveness of the write-in candidate's campaign. But it would also diminish the effectiveness of at least one of the two other candidates.[4]

As to the second prerequisite, Gelb has failed to show a substantial likelihood of success on the merits. He has failed to show an "intentional effort on the part of any state actor to discriminate against write-in voters or write-in candidates as he is required to prove to sustain an equal protection claim." *Gelb I*, 950 F. Supp. at 86, citing *Rodgers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982) (emphasis added).

Moreover, " a federal court must be cognizant of its limited jurisdiction, particularly where the case concerns the broad

---

[4] Gelb tries to minimize the need to show irreparable harm. In his Reply at p.2, Gelb writes: "A legal injury is any damage resulting from a violation of a legal right and which the law will recognize as deserving of redress. The legal right at issue is the equal protection of the laws. An irreparable injury may not be necessarily very large or beyond repair; it can also be an injury that is constantly recurring." He cites two cases, but their facts are far different from our case.

The first cited case was a 1955 decision by an intermediate appellate court in Illinois, *General Electric Co. v. Local 997 United Auto Workers of America*, 130 N.E. 2d 758, 763 (Ill. App. Ct. 1955). The judge granted an injunction when illegal picketing turned violent. The appellate court affirmed, and defined irreparable injury by refenence to a treatise called "Woods on Nuisance."

The second cited case arose during the gas crisis in the early 1970's. Ohio Turnpike Commission v. Texaco, Inc., 35 Ohio Misc. 99, 297 N.E.2d 557, 561 (Ohio Court of Common Pleas, Cuyahoga County, 1973). The judge granted a preliminary injunction restraining Texaco from rationing gas on the Ohio Turnpike, in violation with its contract with the Ohio Turnpike Commission.

power granted to the States to proscribe the 'Times, Places and Manner of holding elections for Senators and Representatives ...'" *The Green Party of the State of New York v. Weiner*, 2000 WL 1280913 at *1, (S.D.N.Y. Sept. 8, 2000), where Judge Lynch cited U.S. Const. art. I, §4, c1.1. and *Tashijan v. Republican Party of Connecticu*t, 479 U.S. 208, 217 (1986). See also Judge Sotomator's opinion granting summary judgment in *Gelb I*:

> [The]Second Circuit declared that it was not in the province of the federal judiciary to micro-manage the details of local elections. "Absent a clear and unambiguous mandate from Congress, we are not inclined to undertake such a wholesale expansion of our jurisdiction in to an area which, with certain narrow and well defined exceptions, has been in the exclusive cognizance of the state courts."

950 F. Supp. at 84 (citstion omitted).

Gelb has read the passage quoted above, and yet he is now asking Judge Daniels to micro-manage the details of local elections. Gelb's motion demands that the City Board not wait 15 days, eight days, or even one day, before counting the write-in votes.

CONCLUSION AND RECOMMENDATION

I recommend that Judge Daniels deny Gelb's motion for a mandatory injunction. I will address the defendants' motions for summary judgment in a separate Report and Recommendation.

Pursuant to 28 U.S.C. § 636 (b) (1) and Rule 72(b) of the

Federal Rules of Civil Procedure, any party may object to this recommendation within 10 business days after being served with a copy, by filing written objections with the Clerk of the U.S. District Court and mailing copies (a) to the opposing party, (b) to the Hon. George B. Daniels, U.S.D.J. at room 410, 500 Pearl Street, New York, N.Y. 10007 and (c) to me at Room 1360, 500 Pearl Street, New York, N.Y. 10007. Failure to file objections within 10 business days will preclude appellate review. *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d Cir. 1988). Any request for an extention of time must be addressed to the District Judge.

DATED: NEW YORK
August 5, 2004

s/ Douglas F. Eaton
U. S. Magistrate Judge

Copies of this Report and Recommendation were mailed this day to:

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Hon. George B. Daniels

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN SISTRICT OF NEW YORK

----------X

IRVING A. GELB

Plaintiff

-against-

THE NEW YORK STATE BOARD OF ELECTIONS, THE NEW YORK CITY BOARD OF ELECTIONS, et al.,

Defendants.

----------X

ORDER 00Civ.6325(GBD)(DFE)

GEORGE B. DANIELS, District Judge:

Pro se plaintiff filed this 42 U.S.C. section 1983 action alleging that in the 2000 Democratic Primary for U.S. Senator, the New York State and City Boards of Elections failed to provide an opportunity for City voters to write in a candidate in violation of his constitutional rights. Among other things, plaintiff alleges due process and equal protection violations. In addition to his complaintiff moved for a "Mandatory Injunction" asking the Court to "issue an ORDER requiring that the New York City Board of Elections (the Board) count at the polls all write-in votes cast in all primary and general elections starting with the September 2004 primary." Magistrate Judge Douglas F. Eaton issued a Report and Recommendation ("Report") wherein he found that plaintiff's motion for a mandatory injunction be denied. In his Report, Magistrate Judge Eaton found that plaintiff failed to make a showing of irreparable harm and a substantial likelihood of success on the merits.

Plaintiff submitted his objections to the Report. The

Court must make a *de novo* determination as to those portions of the Report to which there are objections. Fed. R. Civ. P. 72(b); 28 U.S.C 636(b)(1)(C). It is not required that the Court conduct a de novo hearing on the matter. See United States v. Raddatz, 447 U.S. 667, 676 (1980). Rather, it is sufficient that the Court "arrive at its own, independent conclusion" regarding those portions to which the objections were made. Nelson v. Smith, 618 F. Supp. 1186, 1189-90 (S.D.N.Y. 1985) (quoting Hernandez V. Estelle, 711 F.2d 619,620 (5th Cir. 1983)). Accordingly, the court, in the exercise of sound judicial discretion, must determine the extent, if any, it should rely upon the magistrate judge's proposed findings and recommendations. Raddatz, 447 U.S. at 676. The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. Fed. R. Civ. P. 72(b); 28 U.S.C. 636(b)(1)(C). Where there are no objections, the Court may accept the Report provided there is no clear error on the face of the record. Nelson v. Smith, 618 F.Supp. at 1189; see also Heisler v. Kralik, 981 F.Supp. 830, 840 (S.D.N.Y. 1997), aff'd sub nom. Heisler v. Rockland County, 164 F.3d 618 (2d Cir. 1998); St. Louis v. McClellan, 1993 WL 248214, *1 (S.D.N.Y. June 30, 1993), aff'd, 22F.3d 1090 (2d Cir. 1993). Since plaintiff is proceeding pro se, his objections, as well as his other pleadings, are to be liberally construed and interpreted to raise the strongest argument they suggest. Haines v. Kerner, 404 U.S. 519, 520-21 (1972); McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999)(quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)); Parker v. State of New York, 2003 WL 22852893, at *1 (S.D.N.Y. Nov. 5, 2003)(citations ommitted).

The Court has examined all of plaintiff's various

objections and find them all to be without merit. This Court finds, upon a *de novo* review, that the ultimate findings of the magistrate judge are correct. Magistrate Judge Eaton found that plaintiff failed to show irreparable harm. Pursuant to the New York State Election Law, there can be a 15-day delay before anyone knows the final write-in total. The Report found that this delay would seem to affect everyone equally. Second, Magistrate Judge Eaton found that plaintiff failed to show a substantial likelihood of sucess on the merits because he has not shown an intentional effort on the part of any state actor to discriminate against write-in voters or write-in candidates as he is required to prove to sustain an equal protection claim.

The Court has examined the remaining portions of the Report to which there are no objections, and find that they are not facially erroneous. Accordingly, the Court adopts the Report in its entirety and for the reasons stated therein, plaintiff's motion for a mandatory injunction is denied.

Date: New York, New York
January 3, 2005
SO ORDERED:
s/ GEORGE B. DANIELS
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

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00 Civ. 6325 (GBD) (DFE)

REPORT AND RECOMMENDATION TO JUDGE DANIELS

DOUGLAS F. EATON, United States Magistrate Judge.

Pro se plaintiff Irving Gelb filed this lawsuit under 42 U.S.C. § 1983 alleging primarily that in the 2000 Democratic Primary for U.S. Senator, the New York State and City Boards of Elections failed to provide an opportunity for City voters to write-in a candidate. Gelb says this failure deprived him and other registered Democrats in New York City of their right to vote. Further, he says, he was deprived of his right "to participate in the electoral process as a candidate;" Gelb himself wanted to be a write-in candidate for the nomination.[1] All the defendants have moved for summary judgment, and on December 9, 2003, Judge Daniels referred the motions (Docket Items #28 and #39) to me for a report

[1] Apparently Gelb filed a petition to be on the ballot; the State Board accepted it but a State Supreme Court Justice invalidated it. It is not clear exactly what happened or why, and no one is making an issue of it.

and recommendation. I recommend that Judge Daniels grant summary judgment in favor of all defendants and dismiss the Corrected Second Amended Complaint.[2]

BACKGROUND

This is the third time Gelb has sued the City on the issue of write-in voting in primary elections.[3] In all three cases the dispute centered on the City Board's interpretation of various provisions of New York Election Law ("NYEL") regarding primary elections, particularly § 6-164.[4] To put this case in context, I will briefly summerize the previous two cases:

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[2] At a conference on May 18, 2001, Judge Daniels granted Gelb permission to file a "Corrected Second Amended Complaint." Dated May 5, 2001, it was not docketed, but it appears as an exhibit to Gelb's Notice of Motion, Docket Item #15; I hereby direct the Clerk to docket the motion as granted. The Corrected Second Amended Complaint also appears as Exh. A to docket Item #28.

The only correction made by the "Corrected Second Amended Complaint" was to substitute a new name for one of the City Board defendants. Therefore, I will cite it simply as " Sec. Am. Cplt"

[3] His two earlier lawsuits did not include the State or any State officials. Those cases involved elections for City office, whereas our case involves an election fore a statewide office.

[4] Section 6-164, " Primary, uncontested; opportunity to ballot," provides:

> Enrolled menbers of a party entitled to vote in the nomination of a candidate for public office . . . in a primary election of such party . . . may file with the officer or board with whom are filed designating petitions for such office a petition requesting an oppotunity to write in the name of a candidate or candidates, who need not be specified, for such office or position. . . .

Gelb has consistantly maintained thaty this provision makes a petition necessary only for uncontested primaries, and that a petition is not a prerequisite for write-in voting in contested primaries. The City, on the other hand, had always maintained (until January 2001) that a petition for opportunity to ballot is required even in a contested primary.

"Gelb I"

Gelb complained that, both in the 1993Democratic Party primary and in the general election for Bronx Borough President, the City Board failed to inform voters of their right to cast a write-in vote, and did not provide space on the ballot for write-in votes. Gelb was running for Bronx Borough President as a write-in candidate, and he claimed that the Board's procedures deprived him and other voters who wanted to vote for him (or for any write-in candidate) of their Constitutional rights under the First and Fourteenth amendments. Judge Sotomayor granted summary judgment on Gelb's federal claims, stating that Gelb had "not demonstraterd an intentional effort on the part of any state actor to discriminate against write-in candidates as he is required to prove to sustain an equal protection claim." (She declined to exercise jurisdiction on Gelb's state-law claims.) The Second Circuit affirmed. *Gelb v. Board of Elections in the City of New York*, 950 F.Supp. 82, 86 (S.D.N.Y. 1996), *aff'd*, 125 F.3d 843 (2d Cir. 1997).

"Gelb II"

This case grew out of the 1997 contested primary and general elections for Bornx Borough President; the City again failed to provide ballot spaces for write-in votes. In *Gelb v. Board of Elections in the City of New York*, 71 F.Supp.2d 259 (S.D.N.Y. 1999), Judge Berman granted summary judgment for substantially the same reasons as Judge Sotomayor in *Gelb I*. On appeal, the Second Circuit wrote:

> Since Gelb has been permitted to cast a write-in ballot in all general elections described in his complaint and we find no merit in any of his claims that turn on restrictions of write-in voting in general elections, we reject all such claims. As to Gelb's

> claims relating to primary elections, we find possible merit only in the argument that he was unconstitutionally barred from the write-in voting process as a voter and potential candidate by reason of the City Board's continuing refusal to allow write-in voting in the absence of a petition for opportunity to ballot. Because of the uncertainty of the New York law that is part and parcel of that argument, we certify.

Gelb v. Board of Elections of the City of New York, 224 F.3d 149, 153 (2d Cir. 2000). The New Court of Appeals accepted the certified question, *Gelb v. Board of Elections in the City of New York*, 95 N.Y.S.2d 213 (2000).

The actual question certified was: "Is write-in voting available to an enrolled party voter in a contested primary election where no timely petition for opportunity to ballot has been filed?" 224 F.3d at 157. The City Board's position had been that the answer should be "No," in contrast to what appeared to be the policies of the State Board and most county boards outside the City. However, in January of 2001, the City conceded that the answer should be "Yes." Hence, the New York Court of Appeals wrote:

> [T]he question posed to us by the Second Circuit no longer presents this court with a live controversy. Accordingly, in light of the change in legal postion taken by defendants since certification,[5] and <u>without passing on the legal correctness of that view</u>, we conclude that it would be inappropriate for this Court to answer the question certified.

[5] The brief dated January 4, 2001 is Exh. B to the Marks Decl. It states at p. 5: "We are constrained to conclude after further review that our previously held position that write-in ballots are not mandated in contested primaries absent the filing of an opportunity to ballot petition is incorrect."

Gelb v. Board of Elections of the City of New York, 96 N.Y.2d 748, 749, 725 N.Y.S.2d 273 (2001) (emphasis added). After remand, *Gelb v. Board of Elections of the City of New York*, 2001 WL 327113 (2d Cir. 2001), a trial jury found the City not liable.[6]

"*Gelb III*" - the instant case

In this case, Gelb names as defendants the City Board of Elections ("City Board"), the New York State Board of Elections ("State Board"), and their Commissioners "individually" ("City Commissioners" and "State Commissioners"). Gelb alleges that both the City and State Boards violated his rights as a candidate and as a voter -- the City Board by its failure to provide for write-in voting, and the State Board by its failure to compel the City to alterits policy and provide write-in voting.

Gelb began this lawsuit in the Eastern District when, on August 21, 2000, he moved for a temporary restraining order and preliminary injunction directing the City to offer write-in voting in the September 2000 primary. The case was promptly transfered to our Court. On September 5, Judge Casey denied Gelb's application for injunction, and the case was assigned to Judge Daniels. Meanwhile, on Aug. 22, 2000, the New York Court of Appeals accepted the certified question in *Gelb II*. On December 20, 2000, Judge Daniels stayed *Gelb III* pending decisions from the New York State Court of Appeals and Second Circuit in *Gelb II*. In January 2001, the City Board changed its interpretation of NYEL; this was discussed in a letter to Judge Daniels from assistant

[6] Gelb then appealed based on a jury instruction, but the Second Circuit upheld the verdict. *Gelb v. Board of Elections of the City of New York, et al.* 2002 WL 31018573 (2d Cir. Sept. 10, 2002).

Corporation Counsel Paul Marks.[7] The Second Circuit remanded *Gelb II* in April 2001. Like the high court of New York, the Second Circuit did not rule on (a) the legal correctness of the City's pre-2001 practice or (b) the legal correctness of the City's January 2001 change in its interpretation of state law.

Judge Daniels held conferences on March 14, May 18 and September 5, 2001. The primary purpose of these conferences was to monitor the City's progress toward a plan to offer write-in voting in the 2001 primary; the City did provide for write-in voting in the 2001 primary. On January 31, 2002, I held a settlement conference to no avail. In a memorandum opinion and order dated December 4, 2002, Judge Daniels denied the State's Rule 12(c) motion for judgment on the pleadings.[8] *Gelb v. Board of Elections of the State of New York*, 2002 WL 31729522 (Dec. 4, 2002). Judge Daniels then referred the case to me for general pretrial supervision and the parties proceeded with discovery.

The City defendants served their motion for summary Judgment on May 21, 2003; Mr. Marks submitted a Declaration with Exhibits A-C ("Exh.. ___") and a Memorandum of Law. (Docket Items # 28 and # 29.) Gelb served opposing papers on June 16 (Docket Item # 38).

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[7] On February 27, 2001, Mr. Marks wrote: "In light of City Board of Elections' change in its interpretation of of the law, the City Board of Elections is constrained to acknowledge, with respect to the present case, that under the New York Election Law, write-in voting should have been made available to plaintiff in the September 12, 200 primary...." (Am. Cplt., Exh. D., p.2, emphasis added.) But the City never conceded that its 2000 practice was a violation of the U.S. Constitution.

[8] The State's motion papers do not appear on the docket, but they were discussed at the May 18 and September 5, 2001 conferences. 5/18/01 Tr. at 21-34 (Docket Item # 20) 9/5/01 Tr. at 34-37 (Docket Item # 22). The State's Memorandum of Law, dated April 24, 2001, is at Tab 2 of Docket Item # 31.

The State Defendants served their motion for summary judgment on May 22, 2003. (Docket Item # 39.) Attorney Todd D. Valentine submitted a Memorandum of Law in support. (Docket Item # 41.) Gelb served opposing papers, again on June 16. (Docket Item # 30.) On Julr 1, Mr. Valentine served a Reply Memorandum of Law. (Docket Item # 42.) [9]

DISCUSSION

Summary Judgment Standard

On a motion for summary judgment,

> [t]he appropriate inquiry for determining whether a grant of summary judgment is proper is whether there is a need for a trial. In other words, are there any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994).

The Essential Elements of a § 1983 Action

> In order to maintain a section 1983 action, two essential elements must be present: (1) the conduct complained of must have been committed by a person acting under color of state law; and (2) the conduct complained of must have deprived a person of rights,

[9] The State's motion papers were served in 2003, but they were not docketed until May 26, 2004. See Docket Items # 39, 40,41 and 42.

> privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 531, 101 S.Ct. 1908, 1913, 68 L.Ed. 2d 420 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Courts have had frequent occasion to interpret the term "color of law" for the purposes of section 1983 actions, and it is by now axiomatic that "under 'color' of law means under 'pretense' of law...." *Pitchell*, 13 F.3d at 547-48 (2d Cir. 1994).

Further , "[i]t is well settled in this Circuit that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under §1983.'" Wright v. Smith, 21 F.3d 496 (2d Cir. 1994) (citation omitted) (emphasis added).

THE CITY DEFENDANTS

The Corrected Second Amended Complaint ("Sec. Am. Cplt.") has a sectioned entitled "Why the defendants are being sued." It states:

> the New York City Board of Election is being sued because the constitutional violations herein complained of, were the result of official policy of the City Board acting in its official capacity.

Gelb continues, The Commissioners of the New York City Board of Election are being sued for the following [six] reasons[.]" He lables each reason a "cause of action." I summerize them as follows:

> First, what I will treat as a Due Process claim. "The [City Commissioners] deliberately denied to me and to other [D]emocratic voters our legal right to

vote by write-in the September 12, 2000 Democratic Primary for the office of U.S. Senator."

Second, a fraud claim. The 2000 Democratic Primary sample ballots were "fraudulent" because they omitted any reference to write-in voting in the contravention of N.Y. Election Law §7-104.4(b), 7-104.7 and 7-118.[10] "Causing voters to rely upon sample ballots known to be deficient clearly constitutes actionable fraud" because it is "concealment or nondisclosure of a material fact."

Third, another fraud claim. "The defendants again committed fraud by sending instructions to the voters on how to use the voting machines that omitted instructions on how to cast write-in votes."

Fourth, a claim that the City Board acted *ultra vires*. Because the Senate race was statewide, "the responsibility for determining ballot access lies with the State, not the City.... Although the City Board has no jurisdiction in the matter, it imposed its will none the less."

Fifth, an Equal Protection claim. "Now, in 2001, the defendants are still mailing voters balloting instructions that do not include information on write-in voting. This is no less an Equal Protection violation than omitting write-in instructions from sample ballots and voting machines."

[10] The heading of NYEL §7-104 is "Ballots; form of, voting machines." The heading of §7-118 is "Ballot; facsimile and sample."

Sixth, another Equal Protection claim.

> "Democratic voters in counties outside of New York City were permitted to vote in the September 12, 2000 Democratic [Senatorial] Primary while [D]emocratic voters within New York City were not permitted to do so."

In substance, the Second, Third and Fourth charge violations only of State law. (But Gelb also uses their factual allegations as evidence in suppotr of his federal claims.)

Gelb seeks compensatory and punitive damages. Gelb also wants our Court to order the City to (1) count write-in ballots at the polls; (2) "notify each and every voter in New York City of the right to vote by write-in " and mail a correct and complete copy of instructions on how to use the voting machines ... and the write-in instructions should be prominently labeled and displayed;" and (3) test "each and every voting machine" in New York City "to insure that the write-in mechanism is fully functional so that the write-in ballots can be counted at the polls." (Sec. Am. Cplt. p5-6.)

In the City defendants' memorandum of law in support of summary judgment, Mr. Marks puts forth five points:

> Point I: Plaintiff cannot establish that either the City Board of Elections or the Commissioners of the City Board of Elections intentionally discriminated against him in violation of the fourteenth amendment's equal protection clause.
>
> Point II: Plaintiff's due process claim against the City Board of Elections and its Commissioners should be dismissed because he cannot show that they acted with the intent to provide him or others with the right to vote.

Point III: The Commissioners of the City Board of Elections, all of whom are named as defendants in their individual capacities, are entitled to summary judgment on plaintiff's federal claims on the grounds of qualified immunity.

Point IV: Plaintiff's claims for punitive damages ... should be dismissed.

Point V: Plaintiff's fraud claim should be dismissed.

A. The Equal Protections Claims against the City

In order to establish any violation of Equal Protection Clause, Gelb must show that the City Board or the City Commissioners' conduct was "purposeful" -- purposful in the sense that they intended to discriminate against Gelb or a class of persons of which Gelb is a member. See *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401 (1944) ("the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."); *Gold v. Feinberg*, 101 F.3d 796, 798 (2d Cir. 1996), citing *Powell v. Power*, 436 F. 2d 84 (2d Cir. 1970) ("[A]§ 1983 action to remedy errors in the election process allegedly violating the equal protection clause does not exist unless the state action constituted "'intentional or purposful discrimination.'"); *Ladner v. City* of New York, 20 F. Supp.2d 509 (E.D.N.Y. 1998) (Gershon, J.) See also *Rogers v. Lodge*, 458 U.S. 613, 617-622, 102 S.Ct. 3272, 3275-3278 (1982). discussing *Mobile v. Bolden*, 446, U.S. 55, 100 S.Ct. 3272 (1982). In *Hayden v. County of*

Nassau, 180 F.3d 42, 50 (2d Cir. 1991), the Second Circuit explained:

> Discriminatory purpose "implies that the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its *adverse effects* upon an identifiable group." *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979) (emphasis added). Discriminatory intent or purpose typically refers to those instances when a government actor seeks to disadvantage or negatively impact a group of persons.
> (The underlining is mine.)

Gelb does not directly address the purposefulness issue, except rhetorically.[11] He wants to use the fact that the City Board's decision was deliberate to prove that it was purposefully discriminatory. Thus, he starts with the undisputed fact that the City deliberately decided not to provide for write-in voting in the 2000 primary (a) even after he filed his previous lawsuits, and (b) even though they knew or should have known that other counties in New York State regularly provide for write-in voting. In particular, he wants us to infer that (a) as a result of his law suits, the Board was on notice that its interpretation of the Election Law was wrong,[12] and (b) they knew that their interpretation would

[11] In his Mem. at p.4, he writes, "Defendants claim that in order to establish an equal protection claim, I must show that they intended to discriminate against me. Where their actions and omissions a result of choice?"

[12] Of course Gelb's lawsuit did not put the City Board or its members on notice that they were "wrong;" the lawsuit only put them on notice that in Gelb's view they were wrong. Moreover, Gelb lost his first two lawsuits, and lost on his August 2000 motion for a preliminary injunction.

affect Gelb and other persons who wanted to be write-in candidates or wanted to vote for write-in candidates, would be affected by that decision, and (c) acting with that knowledge constitutes evidence that the Board had an intent to purposefully discriminate against those persons. (See Docket Item # 38, pp. 4-5.)

But the City presents nondiscriminatory reasons for its intentional conduct -- (1) prior to Gelb, no one had ever objected to the City's practice, (2) the City's voting machines (which had been purchased in 1959) had various limitations, and (3) after reviewing the issue with counsel in 1994, the Board had determined that the statute was ambiguous. (See pp. 18-22 below, and Exh. C in Docket Item #25.) Indeed, in his 2001 Approval Memorandum, Governor Pataki specifically mentioned the liminations of the City's voting machines as a valid reason for the amendments to NYEL § 7-114 and § 9-102, which now provide for write-in votes in contested primaries but permit the City to delay counting write-in votes, (See Exh. A to Docket Item # 36.)

The only specific piece of evidence Gelb offers is a document labeled "New York City Campaign Finance Board Intra-departmental Memorandum," dated June, 22, 1993 "Subject: Voter Guide Pages - Write-In Candidates." It is from a Pamila Bleiwas to a Gavin Smith; presumably both of these people are employees of the City Campaign Finance Board,[13] which is seperate from the Board of Elections.

[13] This memo is Exh. A to docket Item # 12. Gelb sees great significance in the section of the memo where Bleiwas says "Tom Zolezzi of the State BOE told me the following with respect to writing in a candidate: 1. Where more than one candidate files a designation petition seeking the party's nomination, there will be a primary election and voters will have the opportunity to write-in candidates." Gelb argues that the "City Board had an obligation to determine whether [the State Board's comments on write-in voting practices] were legitimate. They chose to ignore the memorandum and continued to deny me my rights." Docket Item #38, p. 4.

There is no evidence that any of the defendants saw this memo. Moreover, it does not reflect any awareness of Gelb, or any intent to deprive anyone else from running as a write-in candidate. It does reflect the discrepancy between the State and City practices, but that discrepancy has never been in dispute. The dispute is over whether that discrepancy had a discriminatory effect or purpose; this memo does not bear on that issue at all. Thus, even if it were admissible, this memorandum does not help Gelb, as the party opposing a motion for summary judgment, to meet his burden to "show a genuine issue by presenting evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existance of that [required] element at trial." *Cornett v. Sheldon*, 894 F.Supp. 715, 724, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986) (emphasis added).

The only case Gelb cites on the Equal Protection issue is *Rodriguez v. Popular Democratic Party*, 457, U.S. 1, 102 S.Ct. 2194 (1982); he correctly cites it for the general proposition that "it is when the state extends the franchise to some and denies it to others that a 'right to vote' is protected by the Equal Protection Clause." (Docket Item # 38, p.4.) But the Supreme Court's analysis in *Rodriguez* does not help Gelb. In *Rodriguez*, plaintiffs challenged a Puerto Rican statute that set forth the procedure to fill a mid-term vacancy (caused by the death of the incumbent) in Puerto Rico's House of representatives; rather than providing for a special

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In my view, however, the only possibly "damaging" part of the memo is Bleiwas's report she got from John Del Giorno at the City BOE: "New York City voters do not have the opportunity to write-in a candidate when one designating and an opportunity to ballot is filed [sic] ..., despite the provisions of the State Election Law.... [Such] language is accurate under the law, but does not reflect the procedures followed by the City BOE."

election, the statute vested the deceased legislator's political party with the power to fill the vacancy by appointment. The Supreme Court unanimously found the statute constitutional. It noted that "the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate," and that "temporary" could be "a period of over 29 months." 102 S.Ct. at 2201, 2200. In dismissing the challenge to Puerto Rico statute, the Court pointed out the fact that "[a]ll qualified voters have an equal opportunity to select a district representative in the general election." 102 S.Ct. at 2200 (emphasis added). Gelb's case concerns only the 2000 primary election; it seems to be undisputed that, in the 2000 general election, the City Board counted write-in votes. (See Docket Item # 20; 5/18/01 Tr. 38-39, describing the counting of the write-in votes in the Goodman-Krueger race for State Senate.) Moreover, there is no indication that the City Board affected the outcome of either the primary or general election. See, Donohue v. Board of Elections, 435 F. Supp. 957, 972 (E.D.N.Y. 1976) ("[P]laintiffs failed to prove... that the irregularities in the voting, if eliminated from the final tally, would have changed the result. Accordingly, the court finds no likelihood that plaintiffs will prevail on the merits.")

In sum, it is undisputed that the Board's policy and decision were deliberate -- the Board did intend not to allow for write-in voting in the Democratic primary. But in the Equal Protection context and the circumstances of this case, the salient intent to deny access to the electoral process to potential candidate(s) or deny the potential voter "the constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 1000 (1972). Gelb has not produced sufficient evidence from which a jury

could reasonably infer that type of intent.

B. The Due Process Claim against the City

Gelb does not denominate any of his cause of action as a "Due Process claim,"[14] but in substance his "first cause of action" is such a claim. The City correctly points out that in order to prevail on a Due Process claim, Gelb must show that the City Board and its Commissioners acted with the intent to deprive him or others of a constitutional right. See *Gold v. Feinberg*, 101 F. 3d 796, 801 (2d Cir. 1996):

> In *Powell v. Power*, 436 F.2d 84 (2d. Cir. 1970), ... [w]e further held that the due process clause "offer[s] no guarantee against errors in the administration of an election," at least where state law provides a fair and adequate method for correcting such errors. *Id.* Our decision in Powell rested on comity considerations.
>
> * * *
>
> *Powell* also rested on the principle that not every human error rises to the level of a constitutional violation. *Id.* at 88 ("[W]e cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error.") The Supreme Court has subsequently explained that such a principle underlies the requirement that more than negligent conduct by a state actor is needed in order for a cognizable § 1983 claim to exist based on violations of the due process clause. See *Daniels v. Williams*, 474 U.S. 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 ("[T]he Due Process Clause is simply

[14] "The Commissioners of the New York City Board of Elections deliberately denied to me and to other [D]emocratic voters our legal right to vote by write-in [in the 2000 primary]." (Sec. Am. Cplt. p.2.)

> not implicated by a negligent act of an official ....") (emphasis in the original); *Davidson v. Cannon*, 474 U.S. 344, 347, 106 S.Ct. 668, 670, 88 L. Ed. 2d 677 (1986) (same).
>
> Therefore, under *Powell*, plainiffs who can establish nothing more than "unintended irregularities" in the conduct of elections are barred from obtaining § 1983 relief in federal court, provided an adaquate and fair state remedy exists.[15] *Powell*, 436 F.2d at 85, 88. See also *Donohue v. Board of Elections*, 435 F.Supp. 957, 966 (E.D.N.Y. 1976) (holding that "[p]urposeful deprivation of the right to vote will not be assumed merely because there is evidence that the election officials acted incompetently or negligently...").

The Second Circuit reiterated in *Gold*, also at 801, that

> there has been no change of attitude in this Circuit with respect to the holding of *Powell*. *Powell* continues to be the law of this Circuit. binding upon both the district court and us, and can only be overruled by this court sitting *en banc* or by a decision of the Supreme Court.

On the Due Process issue, the City offers the testimony of Commissioner Douglas A. Kellner in the *Gelb II* trial (on July 10, 2001)[16] to "show [ ] that although the Board of Elections' interpretation of the New York Election Law was erroneous, it was rational, and clearly not arrived at with the intent to deprive any person of the right to vote." (Docket

[15] The NYEL provides such a remedy in §§ 16-100 *et seq.*

[16] The Kellner testimony is Exh. C to docket Item # 28.

Item # 29, p.9.) Kellner testified that he has been "the Manhattan Democrat on the Board of Elections" since May of 1993. (Tr. 77.) Regarding the write-in issue, Kellner testified before Judge Berman as follows:

> MR. GELB: You will notice that at the top of [page 5 in the City's brief to the Court of Appeals] the [B]oard says, we are constrained to conclude after further review that our previously held position that write-in ballots are not mandated in a contested primary absent the filing of an opportunity to ballot petition is incorrect.
>
> THE COURT: Well, maybe you could tell us what that means and what the position was before and what the position was after and why the change was made.
>
> KELLNER: Prior to last fall it was the position of the Board of [E]lections that write-ins would be allowed in primary elections only where petitions for opportunity to ballot were filed. And it's my understanding from research that I did that that has been the position of the City Board of Elections since July of 1959 when New York City first used voting machines in primary elections. Prior to 1959 all primary elections were done on paper.
>
> When I was commissioner in 1993 that had already been the practice of the Board of Elections for many, many years.. And Mr. Gelb, we had first learned of your first lawsuit, I think it was 1994, and at that time the counsel to the commissioners of the

Board of Elections reviewed the election law with the commissioners and at that time we determined that the statute was ambiguous, and that there was -- and that in view of the ambiguity of the statute and the fact that this had been the practice universally done within New York City since voting machines were first done, that we would continue the practice.

In addition, I would add that one of the factors, although not necessarily the legal issue, was that we recognized that it would be extremely difficult in many cases to run all primary elections with write-in ballots and that it would also be confusing for the voters because of the way the voting machines are set up in primary elections.

So, in 1994 we determined that we would continue to support the practice that the Board had been engaged in and challenge your lawsuit in court and it was not until -

* * *

THE COURT: Did Mr. Gelb challenge that practice of the Board of Elections?

THE WITNESS: I believe he did. And - that was the first time in my experience as an election lawyer, as well as a commissioner, that anyone had ever raised that issue. And it was a novel issue and we looked at it and decided that because it was ambiguous and it would be difficult to implement a change, that we would continue the current practice.

* * *

I would also add, at the same time we were

doing that [,] we had also proposed legislation that would clarify the issue and both the state assembly and the state senate had passed a bill...that was ultimately vetoed by the governor. That would have clarified the issue again splitting the difference by having write-in ballots without opportunity to ballot petition for primary elections for public office, but not for party position.

It was just in the last year where when the issue was going to be presented to the highest court of New York State that the Corporation Counsel's office did a very detailed memorandum for the Board of [E]lections and concluded that the better practice would be to cease challenging the objection to write-in voting in primary elections and to acquiesce in that decision. And that led to the submission of this brief [to the New York Court of Appeals].

MR. GELB Once it became known that the law required write-in voting be permitted in contested primaries, weren't you in violation of the law in '94?

KELLNER: The answer is no, that it did not become known that the law prohibited the practice.

And to the contrary, our own counsels to the commissioners, as well as those of us on the board of commissioners who were election lawyers, concluded that the law was ambiguous....

* * *

I take my oath as a commissioner very seriously, and at the time I truly believed that for the

reasons I indicated -- based on more than 30 years of continuous practice without an objection from any candidates, because of the statute where there is no specific provision in the statute that says you had to afford opportunity to write-in ballot in primary elections, and because of the fact that New York City bought voting machines in 1962 which are not really easily set up and are [not] voter friendly for handling write-in ballots, for those three reasons I believed that we were acting properly in 1993.

And I was absolutely shocked when Corporation Counsel handed us a memorandum in the summer of 2000 for for the first time questioning the practice, and I was so shocked that I went back and looked at several years of minutes of the Board of Elections in the 1950s and early 1960s when we first used voting machines for primary elections to see just what had happened, and I'm still not not convinced that the City Board of Elections did not comply with the statute as it existed in 1959 when it first put primary elections on the voting machines without providing for write-in opportunities.

THE COURT: Did you believe that the election that was conducted in 1997 for Bronx borough president was in compliance with law?

THE WITNESS: I did, your Honor.

(Exh. C to Docket Item # 28, Tr. 78-84.)

Gelb has provided no evidence that disputes (let alone, refutes) Kellner's statements. In the documents accompanying Docket Item #38 is Exh. 2, which is a copy of

two pages from a manual describing the {City's] voting machines. At best, it merely shows that, in Gelb's words, "The machines are in fact designed to provide write-in voting in up to four different party primaries." He faults the City for "offer[ing] no substantial proof of mechanical inadquacy." (Docket Item #38, p. 6.) But whatever Exibit 2 shows about the design of the machines, it does not speak to how adaptable they are in practice. Gelb also argues that under New York Election Law section 7-205-5,[17] when voting machines are inadequate, paper ballots must be provided. That may be, but the fact that the City did not provide paper ballots does not create a reasonable inference that it was trying to deprive Gelb of a constitutional right. In short, Gelb's response to Kellner's testimony does not rebut Kellner or show that Kellner's explanation is untrue or pretextual. There is no conflicting evidence that raises an issue of material fact that must be resolved at a trial.

The only other evidence Gelb offers on the Due Process issue is the Campaign Finance Board Memorandum already referred to above (at pp. 14-15). Gelb argues: "Since this memorandum contained relevant information indicating that the State Board had a different position the issue of write-in voting than the City Board, the City Board had an obligation to check it out. They did not do so." (Docket Item #38, p. 6.) This argument helps Gelb no more on the Due Process issue than it did on the Equal Protection Issue. It is

[17] § 7-205. Voting machines; use of at primaries.

4. . . . [The] use of voting machines in all contested primary elections in the city of New York shall be mandatory except as provided in subdivision five. . . .

5. To provide an opportunity for voting for offices. . . for which more candidates have been designated than can be accommodated on the voting machines, the board of elections may provide for the use of a separate paper ballot for such offices when other offices and positions are voted for on voting machines by voters of the same party.

undisputed that the City knew all along that its interpretation differed from the State's.

Gelb argues that the City Board members "are supposed to be subordinate agents of the State Board, complying with the State Board's interpretation of relevant Election Law" (Id., p. 5, emphasis added). But the scope of authority of those two bodies is a matter of state law, not federal or constitutional law. The interpretation of the Election Law is also a matter of state law, and I note that the high court of New York has explicitly declined to rule "on the legal correctness" of the State Board's interpretation, even after the City decided to bring its interpretation into line with the State's. *Gelb*, 96 N.Y.2d at 748, 725 N.Y.S.2d at 273. A § 1983 lawsuit is not a proper vehicle to adjudicate issues of State law. *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990) ("When passing on § 1983 claims, a federal court does not resolve disputes regarding the proper application of state law.") See also, *Nicholson v. Scoppetta*, 344 F.3d 154, 167-71 (2d Cir. 2003); Gelb II, 224 F.3d at 156-58; *Green v. Montgomery*, 219 F.3d 52, 61 (2d Cir. 2000).

In short, to establish a Due Process violation, the plaintiff must show that the defendants acted with the intent to deprive him of the right at issue, and Gelb has not done that. In *Gold*, the Second Circuit explicitly reaffirmed its prior holding in *Powell*:

> We wish to emphasize that our holding today in no way disparages the constitutional right of voters to "cast their ballots and have them counted." *Classic*, 313 U.S. at 315, 61 S. Ct. at 1037. However, despite the consequences of the irregularities which plagued the primary election at issue, we reaffirm today our holding in *Powell*: where, as here, there exists a state law remedy to the election irregularities that is fair and

> adequate, human error in the conduct of elections does not rise to the level of a Fourteenth Amendment constitutional violation actionable under § 1983 in the absence of willful action by state officials intended to deprive individuals of their constitutional right to vote. Short of that, human error is something we all have to live with.

101 F. 3d at 802. Further, I conclude that here, as Judge Koeltl concluded in *Cornett*, "plaintiff did not meet the prerequisites of a due process claim, which requires a "'pervasive unfairness and inadequate state remedies.'" 894 F. Supp. at 727.[18]

C. The State-Law Claims against the City

It is not clear whether our court should take ancillary or supplemental jurisdiction over the state-law claims. But I will discuss them briefly.

The Second Amended Complaint alleges that the City committed two types of fraud; the second cause of action says the sample ballots did not mention the write-in option; and the third cause of action says there was a similar omission in the instructions to voters about the use of voting machines. (See pp. 9-10 above.) But in his opposing memorandum (Docket Item #38), Gelb takes a different tack. There he argues, at page 2: "Finally, plaintiff's claim of fraud should stand because it can be shown that the defendants made deliberate and willful misrepresentations to the Court." (emphsasis added). And at page 9: "The issue of fraud is a simple one. The primary for U.S. Senate is a statewide race.

[18] I realize that in Gelb II, Judge Baer, who had the case in its early stages, opined: "Further, the series of omissions alleged by the plaintiff satisfies the 'pervasive unfairness' requirement needed to prove a Due Process claim." Gelb v. Board of Elections of the City of New York, 1998 WL 386440 (S.D.N.Y. July 10, 1998). But Judge Baer was ruling on the sufficiency of allegations prior to discovery. Gelb has had discovery and now he must point to evidence.

The defendants knew this. The State Board and not the City Board is responsible for adminstering statewide primaries. The City Board lied to the Court when it claimed to have jurisdiction in all primary voting within New York City.." (emphasis added)

Under New York law, for a plaintiff to prevail on a claim of fraud, he must prove five elements by clear and convincing evidence: (1) a materail misrepresentation or omission of fact, (2) made with knowledge of its falsity, (3) with an intent to defraud, and (4) reasonable reliance on the part of the plaintiff, (5) that causes damage to the plaintiff. *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 119 F. 3d 91, 98 (2d Cir. 1997). With reguard to the omissions in the sample ballots and the voting instructions, Gelb could satisfy only the first element. There is no evidence whatsoever on the other four elements. With regard to his claims that the parties lied to the Court, such a claim is outside the scope of the Corrected Second Amended Complaint. The subject of this lawsuit is the conduct surrounding the 2000 primary, not the conduct of counsel during the pendency of this action.

Gelb's fourth cause of action is a state-law claim that the City Board acted *ultra vires*. On that claim, Gelb should clearly have gone to state court. See below, at the end of my section headed "The Equal Protection Claims against the State."

D. Summary of the claims against the City

For the reasons set forth above, no rational jury could find for Gelb on any of his claims against the City defendants (Equal Protection, Due Process. state-law claims of fraud and ultra vires). Accordingly, he is entitled to no relief of any kind. This of course includes his claim for punitive damages. I note that punitive damages are never recoverable against a

municipality in a § 1983 suit. *City of Newport v. Fact Concerts*, 453 U.S. 247, 271, 101 S.Ct. 2748 (1981). As to individual defendants, any award of punitive damages pursuant to § 1983 must be predicated on facts establishing evil motive, intent, recklessness or callous indifference. *Smith v. Wade*, 461 U.S. 30, 51, 103 S.Ct. 1625, 1637, (1983). On the subject of punitive damages, Gelb cites several cases, but their facts illustrate how far short his own evidence is.[19]

THE STATE DEFENDANTS

The Second Amended Complaint, at page 4, alleges that the State Board members have "repeatedly shown no interest in exercising their authority over the City Board."[20] Gelb argues that the State Board violated the Equal Protection clause by ignoring its duty under New York Election Law § 3-102 (2) to supervise the City Board's procedures, especially its alleged duty under Election Law § 7-200, § 7-201 and § 7-205 [21] to compel the City to repair and/or update its voting machines to accommodate write-in voting. Such a compulsion would cost a large amount of money, because the

[19] In *Torres v. City of Waterbury*, 621 A.2d 764 (Conn. App. Ct. 1993), the jury found that the police beat Torres when they arrested him. *Bourque Town of Bow*, 736 F.Supp. 398 (D.N.H. 1990), was a wrongful discharge case in which plaintiff alleged that town selectmen harassed and fired him because he did not support them in their bid for reelction. In *Campise v. Hamilton*, 382 F.Supp. 172, 175-76 (S.D.Tex. 1974), the court determined that the conditions of plaintiff's solitary confinement were so violative of basic concepts of decency as to constitute cruel and unusual punishment. *Baltezore v. Comcordia Parish Sheriff's Dept*, 767 F.2d 202 (5th Cir. 1985), was a case where a sheriff's deputy killed as arrestee on the way to the court house.

[20] The nature and extent of such authority is not entirely clear, although Gelb proceeds on the assumption that it is. Moreover, it is an issue of state law.

[21] The heading of§ 7-200 is "Adoption and use of voting machine." The heading of § 7-201 is "Voting and ballot counting cachines: examination of." The heading of section 7-205 is "Voting machines: use of at primaries."

City elections involve an unusually large number of separate offices. See, e.g., 3/14/01 Tr. at 3-7; 5/18/01 Tr. 34-45; Docket Item #28, Exh. C, Kellner testimony at Tr. 87, 99-100: and Docket Item #36, Exh. B.

Gelb complains: "While voters in counties outside New York City were permitted to vote by write-in in all contested primaries, voters within New York City were wrongfully denied that right." (Sec. Am. Cplt. p. 5, ¶ IID4.) For the September 2000 primary, Gelb seeks "unspecified compensatory and punitive damages" from the State Board and "compensatory and punitive damages" totaling $250,000 from each of the four state commissioners.[22]

The State defendants have also moved for summary judgment. In their memorandum of law, they argue that (1) damages are not recoverable against either the State Board or its Commissioners; (2) the Equal Protection claims must be dismissed because Gelb cannot show that the City Board's decision not to offer write-in voting in the September 2000 primary was the product of intentional or purposeful discrimination by any of the State defendants and (3) Gelb cannot prevail on a due process claim because he cannot establish that the State defendants acted with the intent to deprive him of the right to vote.

In opposition, Gelb argues that "the Eleventh Amendment is very specific as to who may not bring suit against a state. It doesn't say that a state may not be sued by its own

[22] Gelb seeks injunctive relief directing the City , under the supervision of the State Board, to test every voting machine in New York City to deterine if the write-in mechanism of the machine works, in order to facilitate counting write-in ballots at the poll sites rather than a few days later. (Sec. Am. Cplt. pp. 5-6.) In a separate motion filed on February 24, 2004, Gelb seeks a "mandatory injunction" ordering the City to count write-in ballots at the poll sites in the 2004 primary. (Docket Item #35.) In a Report and Recommendation dated August 5, 2004, I recommended that Judge Daniels deny the request for such an injunction.

citizens." (Docket Item #30, p. 4.) However, this literalistic argument has been flatly rejected by the Supreme Court:

> While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890) 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323, U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), the Court said:
>
> > "(W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."
>
> *Id.*, at 464, 65 S.Ct., at 350. Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

Edelman v. Jordan, 415, U.S. 651, 663, 94 S.Ct. 1347, 1355 (1974) (some citations omitted). In an action for damages, our Court could proceed to the merits as to the State Board only if the State had waived its immunity, or if Congress had clearly legislated to overcome the immunity of the State Board. *See Iwachiw v. New York City Board of Elections, New York State Board of Elections, New York State*, 217 F.Supp. 2d, 379 (E.D.N.Y. 2002). Neither of those

circumstances is present in this case.

However, the caption of the Second Amended Complaint makes clear that Gelb is suing the State Commissioners in their individual capacity. The Eleventh Amendment does not bar the action against them. *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985). *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358 (1991), citing *Scheuer v. Rhodes*, 416 U.S. 232, 237, 94 S.Ct. 1683, 1687 (1974). And in the particular context of § 1983 actions, the Supreme Court has held that

> [s]tate officials, sued in their individual capacities, are "persons" within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the "official" nature of their acts.

Hafer, 112 S.Ct. at 364.

Analytically, the State Commissioners could be liable in two ways. First, there could be a sort of "derivative" liability if they fostered the City's conduct that violated Gelb's rights. But that only works if there was an underlying violation by the City; I have concluded that there was none. Second, they could be directly liable if their conduct amounted to a constitutional violation. Gelb emphasizes that the 2000 Senatorial primary was a statewide election. He argues that the State Commissioners should ensured that the write-in option was available throughout the State. Even assuming that Gelb is correct, this would not rise to the level of a constitutional violation unless he produces evidence that the State Commissioners were motivated by purposeful discrimination (a violation of Equal Protection) or an intent to

deprive Gelb of his right to vote (a violation of Due Process).

A. The Equal Protection Claims against the State

Gelb cannot prove an Equal Protection violation unless he shows that the defendants acted with the intent to discriminate against him or a class of persons of which he is a member. To quote the Second Circuit in *Gelb II*, 224 F.3d at 153: "It is thirty-year-old doctrine in this Circuit that a § 1983 action invoking the Equal Protection Clause is not available to remedy election process errors in the absence of a showing of 'intentional or purposeful discrimination.'" *See also, Crawford-El v. Britton*, 523 U.S. 574, 592, 118 S.Ct. 1584, 1594 (1998): "When intent is an element of a constitutional violation, however, the primary focus is not on any possible animus directed at the plaintiff; rather, it is more specific, such as an intent to disadvantage all members of a class that includes the plaintiff." (citation omitted)

Gelb has not alleged any particular conduct on the part of any of the State Commissioners that could lead to personal liability, and he has put forth no evidence to support such a finding. In *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986), the Second Circuit affirmed dismissal of the claim against several defendants, and ruled: "Although Bass' *pro se* account of events may amount to an allegation of deliberate indifference, he does not connect the failure to obtain prompt medical care to any of the correctional or medical defendants." Similarly, Gelb does not connect his allegations to any of the State Board Commissioners. Of course, the crux of Gelb's complaint against the State Board is its failure to act, but he has not tied any individual commissioner to that failure (or decision not to act). He has not provided "specific facts showing that there is a genuine issue for trial." Rule 56(e), Fed. R. Civ. P. His conclusory statement that "The commissioners are clearly responsible for the caused by their

service on the State Board" is insufficient to create an issue of fact to defeat summary judgment. Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993).

Instead of providing evidence to support an inference of such a purpose, Gelb's essentiallt asserts that the requisite purpose should be imputed. The argument goes: (1) the State Board's interpretation of the Election Law was similar to his, (2) the State officials knew the City interpreted it differently, (3) the State had the authority force the City to proceed in accordance withn the State's interpretation; so that (4) the State defendants share responsibility with the City defendants for the failure of the City to provide for write-in voting. He particularly focuses on the period August 21, 2000 (when he moved for the order to show cause in this action) and September 12, 2000 (the date of the primary election). He argues that, at least as of August 21, the State was aware that the City did not intend to provide write-in opportunity in the September Democratic Senate primary; "the State Board was given an opportunity to exercise its authority at that time, in that contest. They declined. " (Docket #30, p.2; see also pp. 7-8.) Gelb assumes (at least for the sake of his argument) the State could have acted quickly enough to correct that in time for the primary.

The State's interpretation of the Election Law regarding write-ins and primaries has always jibed with Gelb's interpretation. They part company only on the issue of whether the State had authority to control the City's conduct. The State Commissioners have repeatedly claimed to have no authority over local boards. But I note that they have failed to come to grips with

(a) the text of NYEL § 3-102;[23] (b) the comments of the Second Circuit,[24] and (c) the comments of Judge Daniels.[25]

But we need not -- and should not -- resolve the authority

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[23] Section 3-102(2) (emphasis added):

> In addition to the enforcement powers and any other powers and duties specified by law, the state board of elections shall have the power and duty to:
>
> 1. issue instructions and promolgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of law;
>
> 2, visit boards of elections, examine their procedures and records and direct that any such procedures be modified in any manner consistent with the provisions of this chapter;

[24] In its first opinion in Gelb II, 224 F.3d at 157, the Second Circuit commented:

> ... The City Board indicates that its interpretation of the Election Law is just as good as the State Board's interpretation, despite the Election Law's clear indication that the City Board is subordinate to the State Board's authority to 1. issue instructions and promolgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of law;
>
> 2, visit boards of elections, examine their procedures and records and direct that any such procedures be modified in any manner consistent with the provisions of this chapter[.] N.Y. Elect. Law § 3--102.

[25] In his opinion denying the State Board's motion on the pleadings, 2002 WL 31729522 at *1, Judge Daniels wrote:

> ... It is of no consequence that the State Board does not own any voting machines nor has the authority to purchase new ones. The State Board has direct responsibility in the administration of the voting process as it is charged with approving voting machines, and no local board of elections may use a non-approved machine unless that machine has otherwise independently been approved by statute. Therefore the State Board has failed to show that under no set of facts could it have any responsibility for the denial of plaintiff's right to have access to the ballot as a write-in candidate.

See also Docket Item # 20, 5/18/01 Tr. 21-34.

issue. Even if we accepted Gelb's argument that the State did indeed have authority, his damages action cannot withstand summary judgment because (1) the State Board is protected by soverign immunity and (2) there is no evidence of purposeful discrimination on the part of the State Commissioners.

Moreover, Gelb had a remedy under state law -- he could have gone to New York State Supreme Court. See Election Law § 16-100.[26] In order for our Court to accept Gelb's arguments, we would have to make a determination regarding the scope of the State Board's authority over the City. That is clearly a matter of state law best left to the state court. *Green Party of the State of New York*, 216 F.Supp.2d 176, 197 (S.D.N.Y. 2002) (LYNCH, J.)[27]

B. The Due Process Claims Against the State

To prevail on a Due Process claim against the State Commissioners, Gelb would have to show that they acted with the intent to deprive him or others of the right to vote., See, *Gold v. Feinberg*, 101 F.3d 796, 800-01(2d Cir. 1996); *Ladner v. State of New York*, 20 F.Supp.2d 509, 516-18

[26] § 16-100. Jurisdiction; supreme court, county court

1. The supreme court is vestewd with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally.

[27] Judge Lynch wrote:

New York's election laws are notoriously opaque, and the particular provisions contested here are awkwardly-drafted and susceptible to different interpretations. Thus, in order to resolve the state constitutional claims here, we would first have to answer difficult questions about the meaning of state statutes, and then, depending on the construction given, determine their consistency with the New York State Constitution. Assessing the validity under the state constitution of state election law seems a particularly inappropriate role for a federal court. If plaintiffs believe that New York officials violated the state's own election laws and Constitution, thay should present those claims to the state courts.

(E.D.N.Y. 1998). Gelb has not made such a showing.

Again, Gelb essentially asserts that the requisite intent should be imputed. He writes:

> Because the responsibility to administer access to the ballot for statewide office rests with the State Board and not the City Board, telling the Court otherwise was willful and deliberate. The due process claim should not be dismissed.

(Docket Item # 30, p. 10.)

Again, the respective authority of the state and local boards remains an issue of state law which we should not resolve. Moreover, a due process violation has an additional prerequisite: "pervasive unfairness and inadaquate state remedies." *Cornett*, 894 F.Supp. at 727, citing *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970).

As with the claims against the City defendants, no rational jury could find for Gelb on any of his claims against the State defendants.

CONCLUSION

For the reasons set forth above, I recommend that judge Daniels grant summary judgment in favor of all the defendants and dismiss the Corrected Second Amended Complaint.

Pursuant to U.S.C. § 636 (b) (1) and Rule 72 (b) of the Federal Rules of Civil Procedure, any party may object to this recommendation within 10 business days after being served witha copy, by filing written objections with the Clerk of the U.S. District Court and mailing copies (a) to the opposing party, (b)to Hon. George B. Daniels, U.S.D.J. at Room 410, 40 Centre Street, New York, NY 10007 and (c) to me at room 1360, 500 Pearl Street, New York, NY 10007.

Failure to file objections within 10 business days will preclude appellate review. *Thomas v. Arn*, 474 U.S. 140 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 58 (2d. Cir. 1988). Any request for an extension of time must be addressed to the District Court Judge.

s/ DOUGLAS F. EATON
United States Magistrate Judge

Dated: New York, New York
August 12, 2004

Copies of this Report and Recommendation were sent this date to:

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Hon. George B. Daniels

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN SISTRICT OF NEW YORK

----------X

IRVING A. GELB

Plaintiff,

AMENDED ORDER

-against- 00Civ.6325(GBD) (DFE)

THE NEW YORK STATE BOARD OF ELECTIONS,
THE NEW YORK CITY BOARD OF ELECTIONS,
et al.,

Defendants.

----------X

GEORGE B. DANIELS, District Judge:

Pro se plaintiff filed this 42 U.S.C. section 1983 action alleging that in the 2000 Democratic Primary for U.S. Senator, the New York State and City Boards of Elections failed to provide an opportunity for City voters to write in a candidate in violation of his constitutional rights.

This current suit is plaintiff's third against the City on the issue of write-in voting in primary elections. In each case, his dispute centered on the City Board's interpretation of various provisions of the New York Election Law regarding primary elections, particulary section 6-163. His first case was dissmissed on summary judgment for failing to demonstrate an intentional effort to discriminate against write-in voters or candidates. The second Circuit affirmed. His second case was also dismissed on summary judgment for substantially the same reason. Plaintiff again appealed.

Although the Second Circuit certified and the New York Court of Appeals accepted the question: "Is write-in voting available to an enrolled party voter in a contested primary election where no timely petition for opportunity to ballot has been filed," the Court of Appeals never ruled on the issue because the City Board thereafter conceded that the answer should be yes.[1]

Defendants moved for summary judgment on all of plaintiff's claims. Specifically, the City defendants argued that plaintiff has not established that the City Board of Elections or its Commissioners specifically intended to discriminate against him and deprive him or others of the right to vote. The City defendants further argued that they were entitled to qualified immunity, and that plaintiff's claims for punitive damages and fraud should be dismissed. The State defendants argue: that damages are not recoverable against either the State Board or its Commissioners; the Equal Protection claims must be dismissed because plaintiff cannot show that the City Board's decision not to offer write-in voting in the September, 2000 primary was the product of intentional or purposeful discrimination by any of the State defendants; and plaintiff cannot establish that the State defendants acted with intent to deprive him of the right to vote.

Magistrate Judge Douglas F. Eaton issued a Report and Recommendation ("Report") wherein he found that

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[1] The Court of Appeals wrote, specifically, that "the question posed to us by the Second Circuit no longer presents this court with a live controversy. Accordingly, in light of the change in legal position taken by defendants since certification, and without passing on the legal correctness of that view, we conclude that it would be inappropriate for this Court to answer the question certified." *Gelb v. Board of Elections of the City of New York*, 96 N.Y. 2d 748, 749, 725 N.Y.S.2d 273 (2001).

defendants' motions for summary judgment pursuant to Fed. R. Civ. P. 56 should be granted and that plaintiff's Corrected Second Amended Complaint should be dismissed in its entirety. In his Report, Magistrate Judge Eaton found that all of plaintiff's claims against defendants should be dismissed.

Plaintiff submitted his objections to the Report. The Court must make a de novo dermination as to those portions of the Report to which there are objections. Fed. R. Civ. P. 72(b); 28 U.S.C. 636(b)(1)(C). It is not required that the Court conduct a de novo hearing on the matter. See *United States v. Raddatz*, 447 U.S. 667, 676 (1980). Rather, it is sufficient that the Court "arrive at its own, independent conclusion" regarding those portions to which the objections were made. *Nelson v. Smith*, 618 F.Supp. 1186, 1189-90 (S.D.N.Y. 1985)(quoting *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983)). Accordingly, the Court, in the exercise of sound judicial discretion, must determine the extent, if any, it should rely upon the magistrate judge's proposed findings and recommendations. *Raddatz*, 447 U.S. at 676. The Court may accept, reject or modify, in whole or in part, the findings and recommendations set forth within the Report. Fed. R. Civ. P. 72(b); 28 U.S.C. 636(b)(1)(C). Where there are no objections, the Court may accept the Report provided there is no clear error on the face of the record. *Nelson v. Smith*, 618 F.Supp. at 1189; see also *Heisler v. Kralik*, 981 F.Supp. 830, 840 (S.D.N.Y. 1997), aff'd sub nom. *Heisler v. Rockland County*, 164 F.3d 618 (2d Cir. 1998); *St. Louis v. McClellan*, 1993 WL 248214, *1 (S.D.N.Y. June 30, 1993), aff'd, 22 F.3d 1090 2d Cir. 1993). Since plaintiff is proceeding pro se, his objections, as well as his other pleadings, are to be liberally construed and interpreted to raise the strongest argument they suggest. *Haines v. Kerner*,

404 U.S. 519, 520-21 (1972); *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1990)(quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)); *Parker v. State of New York*, 2003 WL 22852893, at *1 (S.D.N.Y. Nov. 5, 2003)(citations omitted).

The Court has examined all of plaintiff's various objections and find them all to be without merit. This Court finds, upon a de novo review, that the ultimate findings of the magistrate judge are correct. Magistrate Judge Eaton found that "no rational jury could find for plaintiff on any of his claims against the City defendants (Equal Protection, Due Process, state-law claims of fraud and ultra vires). This of course includes his claim for punitive damages." As to the State defendants Magistrate Judge Eaton similarly concluded that "no rational jury could find for plaintiff on any of his claims against the State defendants."

The Court has examined the remaining portions of the Report to which there are no objections, and find that they are not facially erroneous. Accordingly, the Court adopts the Report in its entirely and for the reasons stated therein, defendants' motions for summary judgment are granted and plaintiff's Corrected Amended Complaint is dismissed in its entirety.

Date: New York, New York
January 31, 2005

SO ORDERED:
s/ GEORGE B. DANIELS
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN SISTRICT OF NEW YORK

----------X

IRVING A. GELB

Plaintiff,

00Civ.6325(GBD)(DFE)

-against- JUDGMENT

THE NEW YORK STATE BOARD OF ELECTIONS,
THE NEW YORK CITY BOARD OF ELECTIONS, et al.,

Defendants.

----------X

File Stamp: U.S. District Court Filed Feb. 7, 2005 S.D.N.Y.

Whereas the Honorable F. Eaton, United States Magistrate Judge, having issued a Report and Recommendation (the "report") recommending that defendants' motions for summary judgment pursuant to Fed. R. Civ. P. 56 be granted, and that plaintiff's corrected second amended complaint be dismissed in its entirety, and the matter having come before the Honorable George B. Daniels, United States District Judge, and the Court, on January 31, 2005, having rendered its Amended Order adopting the report in its entirety, granting defendants' motions for summary judgment. and dismissing plaintiff's corrected amended complaint in its entirety, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Amended Order dated January 31, 2005, the report is adopted in its entirety; defendants' motions for summary judgment are granted; and plaintiff's corrected amended complaint is dismissed in its entirety.

Dated: New York, New York
Feb. 7, 2005

BY: S/ J. Michael McMahon
Clerk of Court

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING A. GELB

Plaintiff Pro Se,

CORRECTED SECOND
AMENDED COMPLAINT
00 - CIV - 6325 (GBD)
JURY TRIAL DEMANDED

-against-

The Board of Elections of the City Of New York and the Commissioners of said Board, Individually, Weyman A. Carey, Michael J. Cilmi, Terrance O'Connor, Ronald J. D'Angelo, Douglas A. Kellner,Crystal N. Paris, Gertrude Strohm, Frederic M. Umane, Vincent J. Velella and Stephen H. Weiner,

and

The Board of Elections of the State Of New York and the Commissioners of said Board, Individually, Neil W. Kelleher, Carol Berman, Evelyn J. Aquila, and Helen A Moses Donohue

Defendants.

----------X

At all times hereinafter mentioned, plaintiff was and still is a resident of 4030 Bronx Boulevard, apt. 2D, Bronx, New York 10466.

The New York State Board of Elections and its

commissioners are located at 40 Steuben Street, Albany, New York 12207-2109.

Counsel for the New York State Board of Elections and its commissioners is Mr. Todd D. Valentine Esq., whose office is at 40 Steuben Street, Albany, New York 12207-2109.

The New York City Board of Elections and its commissioners are empowered under New York State Law and they are located at 32 Broadway, New York, New York 10004.

Counsel for the New York City Board of Elections and its commissioners is Mr. Paul Marks, Assistant Corporation Counsel of the City of New York at 100 Church Street, room 2-104, New York, New York 10007.

I. Preliminary Statement:

I am a United States citizen, 52 years of age, a resident of Bronx County in New York City and an enrolled Democratic voter. As such, I was entitled to vote by write-in as well as ask that other democrats vote for me by write-in in the September 12, 2000 contested Democratic Primary for the office of United States Senator.

This *Second* Amended Complaint is necessary for the following reasons. In September 2000, when my earlier amended complaint was filed, the City Board had not yet filed their brief[1] with the New York State Court of Appeals. In that brief the defendants clearly admit to violating N.Y.S. Election Law by withholding the legal right to vote by write-in in contested primaries. Further, in his letter to the Court[2], Marks admits that the City Board of Elections again violated the law by wrongfully withholding from me my legal to

[1] Exhibit "C", dated January 4, 2001.

[2] Exhibit "D", dated February 27, 2001.

participate in the September 12, 2001 Democratic Party Primary for U.S. Senator.

Further, this second amended complaint is necessary to clearly name the parties responsible for the violations complained of herein.

The deliberate and willful actions and omissions by the defendants, that denied to me and to other registered democratic voters our legal rights, were in clear violation of the First and Fourteenth Amendments of the U.S. Constitution. This action is being brought pursuant to 42 U.S.C. § 1983 which requires that the conduct complained of (1) must have been committed by a person or persons acting under color of law, and (2) deprived a person of rights, privileges and immunities secured by the Constitution or the law of the United States. Pitchell v. Callan, 13 F. 3d 545, 547 (2d Cir. 1994).

Further, the jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1331, 1343(a)(3), and 2201. Venue of this action is proper in this district, pursuant to 28 U.S.C Section 1391(b), on the ground that the claims herein alleged arose in this district, and throughout the State of New York.

II. Why the defendants are being sued:

A. The New York City Board of Elections is being sued because the constitutional violations herein complained of, were the result of official policy of the City Board acting in its official capacity[3] .

B. The Commissioners of the New York City Board of Elections are being sued for the following reasons:

1. First cause of action: The Commissioners of the New York City Board of Elections deliberately denied to me and to

[3] See LEATHERMAN v. TARRANT COUNTY NICU, 507 U.S. 163 (1993)

other democratic voters our legal right to vote by write-in in the September 12, 2000 Democratic Primary for the office of U.S. Senator.

New York State Election Law, § 6-164 requires that the Board of Elections provide the voters with an opportunity to write in candidates in primaries that are contested.

There were two designated democratic candidates on the September 12, 2000 Democratic Primary for the office of U.S. Senator. The defendants deliberately ignored their fiduciary obligation to provide for write-in voting in this race. In his letter to the Court, dated February 27, 2001, Paul Marks states "[t]he City Board of Elections is *constrained* to acknowledge, with respect to the present case, that under New York Election Law, write-in voting should have been made available to plaintiff in the September 12, 2000 Democratic Party primary election for the office of United States Senator.[4] "(emphasis added.)

2. Second cause of action: The 2000 Democratic Primary sample ballots were fraudulent.

Fraud ""... consists of a misrepresentation, *concealment* or *nondisclosure* of a material fact, or at least misleading conduct, devices or contrivance."(emphasis added) 234 F. Supp.201, 203.' Steven H. Gifis' *Law Dictionary*, 3rd Edition. The defendants intentionally presented the primary voters with deficient and therefore misleading balloting instructions.

New York State Election Law, § 7-104.4(b) describes how the write-in vote is to be cast in the voting machine. § 7-104.7 describes how the write-in slot or device operates as an integral part of the voting machine. § 7-118 requires that sample ballots be displayed "... showing such part of the

[4] Exhibit "D", page 2 of letter to Court from Paul Marks.

voting machine as shall be in use at that election...and shall contain suitable illustrated directions for voting on the voting machine." In New York City, the write-in mechanism on the voting machines consists of a column of 40 slots to the left of column #1. The defendants deliberately provided sample ballots for the 2000 primary that omitted any reference to write-in voting. Causing voters to rely upon sample ballots known to be deficient clearly constitutes actionable fraud.

3. Third cause of action: The defendants again committed fraud by sending instructions to the voters on how to use the voting machines that omitted instructions on how to cast write-in votes[5] . In the defendants' brief to the New York State Court of Appeals, dated January 4, 2001, the defendants state "We are constrained to conclude after further review that our previously held position that write-in ballots are not mandated in contested primaries absent the filing of an opportunity to ballot petition is incorrect."[6] In the 1998 general election, the City Board allegedly began to include write-in instructions on facsimiles and sample ballots. The fact that mailings like the one to Ms Schuloff continue, even after the City Board's admissions and concessions speaks to their fraud.

4. Fourth cause of action: The September 12, 2000 Democratic Primary for the office of U.S. Senator was a statewide race. Because the boundary in the race in question extends beyond New York City, New York State Election Law § 6-144 requires that petitions in that race be filed with the New York State Board of Elections not with the City Board. Therefore, the responsibility for determining ballot

[5] Exhibit "B" is a mailing, dated 3/8/01, from the New York City Board of Elections to voter Anita J. Schuloff. In it, the Board explains how to use the voting machine but omits instructions on write-in balloting.

[6] Exhibit "C" , page 5.

access lies with the State, not the City.

The N.Y. State Board of Elections is already on record as stating in effect that when a race is contested, an opportunity to ballot already exists so a petition to create one is unnecessary.[7] Although the City Board has no jurisdiction in the matter, it imposed its will none the less.

5. Fifth cause of action: In my earlier complaint, 97-9404(RMB), it was pointed out that a violation of the Equal Protection clause of the 14th Amendment was committed by providing incomplete instructions on sample ballots and within the voting machine because they failed to also include instructions on how to cast a write-in vote on the voting machine. In response, defendants allegedly began to include write-in instructions in the 1998 general election. The fact that they would make such a change, is an indication that the charge had merit. Now in 2001, the defendants are still mailing voters balloting instructions that do not include information on write-in voting[8]. This is no less an Equal Protection violation than omitting write-in instructions from sample ballots and voting machines.

6. Sixth cause of action: It is when a state extends the franchise to some and denies it to others that a "right to vote" issue arises and is protected by the equal protection clause. See Rodriguez v. Popular Democratic Party, 457 U. S. 1(1982). Democratic voters in counties outside of New York City were permitted to vote in the September 12, 2000 Democratic Primary for the office of U.S. Senator while while democratic voters within New York City were not permitted to do so.

In his February 27, 2001 letter to the Court, Assistant

[7] See Exhibit A, first scenario.

[8] Exhibit "B" second page.

Corporation Counsel Paul Marks states that "[t]he City Board of Elections is constrained to acknowledge, with respect to the present case, that under New York Election Law, write-in voting should have been made available to plaintiff in the September 12, 2000 Democratic Primary election for the office of United States Senator.[9] " This admission cannot excuse the violations of plaintiff's right to participate in the September 12, 2000 Democratic Party Primary.

C. The New York State Board of Elections is being sued because the constitutional violations here in complained of, were the result of official policy of the State Board acting in its official capacity[10] .

D. The Commissioners of the New York State Board of Elections are being sued for the following reasons:

1. First cause of action: N. Y. Election Law § 3-102(2) states that the State Board has authority to "visit boards of elections, examine their procedures and records and direct that any such procedures be modified in any manner with provisions of this chapter." They have repeatedly shown no interest in exercising their authority over the City Board.

2. Second cause of action: Voting machines for use within New York City must be approved by the New York State Board of Elections. New York State Election Law § 7-200, §7-201. The paper on which write-in votes in New York City are cast in the voting machines "jams" in the machines. According to the City Board, this problem has persisted for more than 20 years. It was the State Board's obligation to compel the City Board to repair its machines. This was never done.

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[9] Exhibit "D", page 2 of letter to Court from Paul Marks.

[10] See LEATHERMAN v. TARRANT COUNTY NICU, 507 U.S. 163 (1993)

3. Third cause of action: New York City's voting machines were designed to permit write-in voting in no more than four primaries. The City Board has said that it cannot provide write-in voting in primaries because there are now eight political parties in New York State there are insufficient write-in spaces in the machines. New York State Election Law § 7-205 permits the use of voting machines in only as many primaries as secured voting can be assured. The New York City Board should have been compelled to replace its voting machines when the total number of permanent political parties increased from four to five. It should not have been allowed to continue to the point where there are now eight permanent political parties and the City Board now claims that even if ordered to do so, it can't provide write-in voting in primaries. By continuing to permit New York City to use its defective and inadequate voting machines, the State Board has contributed to the violation of voters' rights within New York City.

4. Fourth cause of action: While voters in counties outside of New York City were permitted to vote by write-in in all contested primaries, voters within New York City were wrongfully denied that right. This clearly constituted an equal protection violation upon which the State Board should have acted but did not.

III. <u>What relief is sought</u>:

A. The following injunctive relief is necessary to compensate for years of Election Law violations.

1. Write-in votes must be counted at the polls.

New York State Election Law §9-102(2)(a) requires that write-in ballots be counted at the polls together with the other votes. This is not an option. It is the City Board's legal obligation. To continue to allegedly count the write-in

ballots at a later date constitutes an Equal Protection violation because the intendment of the law is to insure that each vote is equal to and as important as every other vote.

Further, in the event that no candidate in a contested primary obtains a 40% plurality, there must be a run off primary between the two leading candidates. This would be a second contested primary and write-in voting would again be permitted. Not counting the write-in votes at the polls, would favor the designated candidates and give them an unfair advantage.

2. The City Board must notify each and every voter within New York City of the right to vote by write-in. For about forty-two years the City Board has wrongly withheld information on write-in balloting from the voters. As can be seen on page two of the City Board's notice to Ms Schuloff[1], they continue to send incomplete and therefore incorrect information to City voters.

By omitting write-in instructions while providing instructions for voting for designated candidates, the defendants are committing an Equal Protection violation.

The Court should order the City Board to mail a correct and complete copy of instructions on how to use the voting machines to every voter in the City. In order to compensate for years of deliberate omissions, the write-in instructions should be prominently labeled and displayed.

3. New York Election Law § 7-206(3) requires that voting machines be tested "at least annually" and that such testing be done under the supervision of the New York State Board of Elections. Each and every voting machine in New York City must be tested to insure that the write-in mechanism is fully functional so that write-in ballots can be

[1] Exhibit "B"

counted at the polls as required by New York State Election Law §9-102(2)(a).

B. By the willful and deliberate actions and omissions of the defendants, I was wrongfully and illegally denied my right to participate in the September 12, 2000 Democratic Party Primary for U.S. Senate in New York State. This was the result of an established pattern of deliberate misconduct.

In the Supreme Court's decision in City of Newport v. Facts Concert, 453 U. S. 247 (1981), the Court held that municipalities and states cannot be held liable for punitive damages unless the Constitutional violations complained of were the result of official policy. The Court felt that since the violations attributed to municipalities and states are actually the result of actions by public employees and public officials, punitive damages properly fall upon the public employees and public officials responsible for willful and malicious violations.

In this instance, the Constitutional violations are the result of long standing official public policy and the perpetrators are City and State Government Officials who arrogantly violated their public trust. They had several years to correct their conduct but chose rather to continue, under color of law, to deny the plaintiff and other voters their legal rights. Plaintiff now seeks the following relief.

1. Unspecified compensatory and punitive damages from the Board of Elections of New York City.

2. Compensatory and punitive damages from each of the ten commissioners on the Board of Elections of New York City, $300,000, for a total of $3,000,000.

3. Unspecified compensatory and punitive damages from the Board of Elections of New York State.

4. Compensatory and punitive damages from each of the four commissioners on the Board of Elections of New York State, $250,000, for a total of $1,000,000.

C. Such other and further relief as to this Court seems just, proper and equitable.

Dated: May 5, 2001

s/ Irving A. Gelb

Plaintiff, pro se

...MER
ECORDS
AND
BRIEFS

No. 05-1161

Supreme Court, U.S.
FILED
MAR 2 9 2006
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

IRVING A. GELB,

Petitioner,

-against-

NEW YORK CITY BOARD OF ELECTIONS, et al.,

-and-

NEW YORK STATE BOARD OF ELECTIONS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
Attorney for City Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1010

LEONARD J. KOERNER,*
JULIE STEINER,
of Counsel.
*Counsel of Record

March 28, 2006

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly affirm the thorough and well-reasoned District Court opinion, which dismissed petitioner's complaint and held that the City Board did not violate petitioner's equal protection or due process rights, because he failed to demonstrate that the City Board purposefully and intentionally discriminated against him as a write-in candidate and voter?

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No. 05-1161

IN THE
SUPREME COURT OF THE UNITED STATES

IRVING A. GELB,

Petitioner,

-against-

THE BOARD OF ELECTIONS OF THE CITY OF NEW YORK, et al.,

-and-

THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY RESPONDENTS' BRIEF IN OPPOSITION

In this 42 U.S.C. §1983 action, *pro se* petitioner, Irving A. Gelb ("petitioner"), alleges that respondents, the Board of Elections of the City of New York and its Commissioners ("the City Board"), as well as the Board of Elections of the State of New York and its Commissioners ("the State Board"), violated his First and Fourteenth Amendment rights by denying him, as a voter and as a candidate, and others the right to vote by write-in ballot in the September 2000 Democratic Party primary election for

the United States Senate. This lawsuit is petitioner's third against the City Board and his first against the State Board.

City respondents request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's September 29, 2005 unanimous, unreported summary order in this case. This is because the order below does not conflict with a decision of this Court or another court of appeals on any question petitioner attempts to formulate. Nor does the petition otherwise properly raise any other issue calling for this Court's exercise of its supervisory power.

COUNTER STATEMENT OF FACTS

Background to this Action

(1)

Petitioner's First Lawsuit Regarding the 1993 Democratic Party Primary and General Elections for Bronx Borough President

In 1993, petitioner campaigned to be nominated by the Democratic Party for the office of Bronx Borough President. Petitioner submitted a designating petition to have his name placed on the primary ballot, as required by section 6-118 of the New York Election Law, however, the incumbent successfully challenged the petition. As such, petitioner's name was removed from the ballot. Undeterred, petitioner continued his campaign by running in the primary and general elections as a write-in candidate.

In 1994, petitioner filed suit against the City Board seeking injunctive relief and compensatory and punitive damages ("*Gelb I*"). Petitioner alleged that his First and Fourteenth Amendment constitutional rights and state law rights under the New York Election Law were violated in that voters were not informed of their right to cast a write-

in vote nor were provided with the means to cast those votes. Petitioner claimed that there were also several ballot and voting booth irregularities during both the 1993 primary and general elections.

(a)

Prior to submitting its answer, the City Board filed a motion to dismiss for failure to state a cause of action pursuant to Fed. R. Civ. P. 12(b)(6). In an order entered March 29, 1995, the United States District Court for the Southern District of New York (Sotomayor, U.S.D.J.), denied the motion and also declined the City's request to abstain from hearing the case on the ground that there was an ambiguity in the New York Election Law as to whether there is a right to vote by write-in in all primary elections. 888 F. Supp. 509; 517-519. Specifically, the District Court held that petitioner sufficiently stated a Due Process and Equal Protection claim under 42 U.S.C. section 1983 to survive a motion to dismiss in that, reading the *pro se* papers liberally and fairly, petitioner did allege that the City Board acted intentionally in denying petitioner his right to vote and run by write-in. *Id.* at 516-517.

With respect to abstaining from deciding the federal constitutional issues, the City Board had contended that New York Election Law section 6-164 did not permit write-in voting in contested primary elections absent a valid opportunity to ballot petition. That section, titled "Primary, uncontested; opportunity to ballot," provides in relevant part that party voters "equal in number to at least the number of signers required to designate a candidate for such office or position . . . may file . . . a petition requesting an opportunity to write in the name of a candidate or candidates, who need not be specified, for such office or position." As the Second Circuit noted in Gelb's second lawsuit, "the filing of a valid petition for opportunity to ballot, i.e., a petition for write-in voting,

turns an uncontested primary election into a contested one." 224 F.3d at 156.

However, the District Court held that it would not abstain, finding that the New York Election Law pertaining to the opportunity to cast write-in votes in primary elections was not ambiguous, going so far as to opine that "[t]he right to write-in candidates during a primary election may be more settled than [the City Board] believe[s]." 888 F. Supp. at 519-520; 519, n.6. The Court pointed to the plain language of the statutes as well as an August 28, 1963 opinion of the New York State Attorney General, who found that there was a right to write-in voting in all primary elections. *Id.* at 519.

(b)

After discovery was complete, both petitioner and the City Board moved for summary judgment. In an order entered December 5, 1996, the Southern District (Sotomayor, U.S.D.J.), denied petitioner's motion, granted the City Board's motion and dismissed the complaint in its entirety. 950 F. Supp. 82. The District Court held that the imperfections in the election process alleged by petitioner did not rise to the level of a federal constitutional violation, because none rendered either election "so pervasively unfair as to require a federal remedy under the due process clause." *Id.* at 85. In addition, notwithstanding the Court's earlier "finding" on the City Board's motion to dismiss, the Court now noted that "there is great uncertainty within state law as to whether a write-in option must be provided in a primary election." *Id.* at 85, n.3.

The District Court also held that petitioner did not demonstrate that the City Board acted intentionally to discriminate against write-in voters or candidates and, thus, his Equal Protection claim could not be sustained. 950 F. Supp. at 86.

Finally, the District Court held that, because no federal constitutional violation existed and because all federal law claims were eliminated before trial, it would "relinquish jurisdiction" over petitioner's state law claims. 950 F. Supp. at 86-87.

(c)

Petitioner thereafter appealed (Second Circuit Docket No.: 97-7077). In a summary order entered October 3, 1997, the Second Circuit unanimously affirmed the District Court's dismissal of petitioner's first complaint. 125 F.3d 843.

(2)

Petitioner's Second Lawsuit Regarding the 1997 Democratic Party Primary and General Elections for Bronx Borough President

Petitioner again campaigned for Bronx Borough President as a write-in candidate in the 1997 Democratic Party primary election. In this second lawsuit against the City Board under 42 U.S.C. section 1983 that alleged similar Due Process and Equal Protection claims as in *Gelb I* and sought injunctive relief and damages ("*Gelb II*"), petitioner claimed that the City Board failed to provide instructions on how voters might write-in candidates for the 1997 primary as well as in the 1993 through 1996 primaries. Petitioner also alleged that the City Board's failures carried over in the 1997 general election. Additionally, petitioner claimed that the write-in votes were not properly counted in the 1997 general election nor in prior elections.

(a)

The City Board moved to dismiss petitioner's complaint pursuant to Fed R. Civ. P. 12(b)(6) for failure to

state a cause of action and on collateral estoppel grounds. In an order entered July 19, 1998, the Southern District of New York (Baer, U.S.D.J.), denied the motion, holding that (1) the issues in *Gelb I* were not identical to the issues in this case, because "[t]he claims in *Gelb I* solely concerned the 1993 election, while the claims here allege a pattern of repeated violations leading up to and including the primary and general election of 1997" and because the issue of "pattern of omissions" was not "actually litigated" in *Gelb I*; and that (2) "at least at this stage in the litigation" and "at this juncture," petitioner's allegations "breath[ed] life . . . into his Equal Protection claims" as well as his Due Process claims. 1998 U.S. Dist. LEXIS 10240, at **12-15; 21.

(b)

Thereafter, petitioner moved and the City Board cross-moved for summary judgment. In an order entered September 30, 1997, the Southern District (Baer, U.S.D.J.), denied petitioner's motion and granted the City Board's cross-motion, thereby dismissing the complaint. 71 F. Supp. 2d 259. As in *Gelb I*, the Court here held that petitioner did not have a valid Due Process claim, because he did not offer any evidence that the City Board's procedures and policies were "pervasively unfair" in that they prevented him or any voter from casting a write-in vote and in that such procedures had an adverse impact on the outcome of the 1997 elections. . *Id.* at 267. Additionally, the Court held that petitioner failed to offer any evidence that the 1997 elections were conducted any differently than the 1993 elections, which were found to be constitutional in the first lawsuit. *Id.* Further, the Court held that petitioner had an adequate state law remedy under the New York Election Law to "air" his electoral grievances. *Id.*

As to petitioner's Equal Protection claim, the District Court again held that petitioner failed to

demonstrate that the City Board intended to deprive him of his right to vote by write-in ballot or to be a write-in candidate. 71 F. Supp. 2d at 268. The Court pointed out that petitioner did not and could not dispute that write-in ballots were offered in all general elections. *Id.*

With respect to primary elections, the District Court noted that petitioner conceded that the City Board offered write-in voting in such elections where a valid opportunity to ballot petition was filed. 71 F. Supp. 2d at 268. The Court added that, even though the City Board "has continued to apply its (legal) interpretation of New York Election Law § 6-164 [no write-in voting in contested primary elections absent a valid opportunity to ballot petition] despite Petitioner's protestations in *Gelb I*, [this] demonstrates, perhaps, that the Board's actions were not the result of inadvertence. It does not make them illegal. Mere willfulness, without the specific intent to deprive Petitioner of a fundamental right, is insufficient to establish an Equal Protection claim." *Id.* Indeed, the Court pointed out that neither Justice Sotomayor in 1996 nor the Second Circuit in 1997 ruled on whether the City Board's interpretation was correct and that the District Court noted that there was great uncertainty within state law as to whether write-in options must be provided in a primary election. *Id.* at n.19.

Finally, since the District Court eliminated all of petitioner's federal claims, as in *Gelb I*, the Court dismissed petitioner's state law claims. 71 F. Supp. 2d at 269.

(c)

Thereafter, petitioner appealed (Second Circuit Docket No.: 99-9369). In an order entered August 22, 2000, the Second Circuit found merit only to petitioner's claims relating to primary elections to the extent that he might have been unconstitutionally barred from the write-in

voting process as a voter and candidate because of the City Board's "continuing refusal to allow write-in voting in the absence of a petition for opportunity to ballot." 224 F.3d 149, 153. The Second Circuit recognized that there was uncertainty in the New York Election Law on this issue, specifically, whether write-in voting was impermissible in the absence of a valid petition for opportunity to ballot even though there were two or more candidates and a primary was therefore contested and would be held in any case. Thus, the Second Circuit certified to the New York State Court of Appeals the following question: "Is write-in voting available to an enrolled party voter in a contested primary election where no timely petition for opportunity to ballot has been filed?" *Id.* at 158.

In so certifying to the New York State Court of Appeals, the Second Circuit added that "it may well be that the [City] Board engaged in arbitrary, purposeful and intentional discrimination." 224 F.3d at 157. However, the Second Circuit cautioned that it did not "foreclose the possibility of ultimate summary judgment in favor of the City Board . . . ." *Id.*

In an order entered September 14, 2000, the New York State Court of Appeals accepted the certified question. 95 NY2d 879.

(d)

In its January 2001 brief to the New York State Court of Appeals, the City Board stated that it was "constrained to conclude after further review that our previously held position that write-in ballots are not mandated in contested primaries absent the filing of an opportunity to ballot is incorrect." The City Board, therefore, concluded that the certified question should be answered in the affirmative.

In an order entered February 20, 2001, the New York State Court Appeals held that, in light of the change in the City Board's legal position following the certification, "it would be inappropriate for this Court to answer the question certified." 96 NY2d 748, 749. In declining to answer the certified question, the Court of Appeals however specifically did not "pass[] on the legal correctness of" the City Board's new view of the New York Election Law. *Id.*

(e)

Thereafter, in light of the City Board's change in position and the New York State Court of Appeals' refusal to answer the certified question, the Second Circuit vacated the District Court's grant of summary judgment and remanded the matter for the District Court to determine whether the City Board engaged in "intentional or purposeful discrimination." 7 Fed. Appx. 97, 2001 U.S. App. LEXIS 5647 (2001).

Upon remand, the matter proceeded to trial on July 10 and July 11, 2001, which resulted in a jury verdict in favor of the City Board. 47 Fed. Appx. 10, 2002 U.S. App. LEXIS 18688, at *2. The jury found that petitioner failed to prove that the City Board had intentionally discriminated against him by not offering write-in voting in the September 1997 Democratic Party primary election.

Petitioner thereafter appealed claiming that the jury was improperly charged on intentional discrimination and that the District Court erred in excluding certain evidence. 47 Fed. Appx. 10, 2002 U.S. App. LEXIS 18688, *2 (Second Circuit Docket No.: 01-9116). In an order entered September 10, 2002, this Court unanimously affirmed the jury's verdict. *Id.*

This Action

(1)

On August 21, 2000, one day before the Second Circuit certified its question to the New York State Court of Appeals, petitioner commenced this, his third action against the City Board, in the Eastern District of New York. Petitioner alleged an Equal Protection violation in that he and other voters in the City of New York would be denied the right to vote by write-in in the September 2000 Democratic Party primary election for the United States Senate, while voters outside the City would be permitted to do so. Petitioner claimed that the City Board was aware in 1993 of its obligation to provide write-in balloting in contested primaries, since, pursuant to New York Election Law section 6-164, an opportunity to ballot petition need only be submitted in order to convert an uncontested primary into a contested one. Petitioner further alleged that the voting machines used by the City Board were defective, because the paper rolls jammed in the machine.

Simultaneously, petitioner moved for a preliminary injunction and temporary restraining order, enjoining the City Board to only use ballots and voting machines that permit write-in voting in the 2000 primary election.

On August 23, 2000, this matter was transferred to the Southern District of New York. On August 24, 2000, the Southern District denied petitioner's motion.

Following the City Board's January 2001 concession that its earlier interpretation of the New York Election Law regarding write-in votes in primary elections was incorrect, petitioner filed a Corrected Second Amended

Complaint in May 2001 (A61-A71).[1] The amended complaint simply substituted a new name for one of the City Board defendants.

(2)

In May 2003, the City Board moved for summary judgment. Thereafter, in February 2004, before the motion was ruled upon, petitioner moved for a "mandatory injunction" requiring the City Board to count at the polls all write-in votes cast in all primary and general elections starting with the September 2004 primary. Petitioner maintained that the City Board counted the write-in votes several days later, a practice inconsistent with New York Election Law section 9-102 as it existed in 2001, thus violating the Equal Protection Clause.

(3)

The District Court Decisions

(a)

On August 5, 2004, in a 9-page Report and Recommendation to United States District Court Judge George Daniels, Southern District Magistrate Judge Douglas Eaton recommended that petitioner's motion for an injunction be denied. The Magistrate Judge noted that, in 2001, the New York State Legislature enacted, and continues to do so each year, an amended version of the statute in question, each effective for one year, which permits the City Board, among others, to choose when it will count the write-in votes, up to 15 days after the voting. The Magistrate Judge ruled that, since the New York Election Law gave all local boards of elections throughout

[1] Unless otherwise indicated, numbers in parentheses preceded by the letter "A" refer to pages in Petitioner's Appendix.

New York State the same alternatives regarding when to count write-in votes, and, thus, any delay in the voting would affect everyone equally, the Equal Protection Clause was not violated. Therefore, petitioner could not demonstrate irreparable harm to obtain such an injunction.

In addition, the Magistrate Judge found that petitioner could not demonstrate a substantial likelihood of success on the merits, in that he failed to show an intentional effort on the part of the City Board to discriminate against him and other write-in voters or write-in candidates.

(b)

Thereafter, on August 12, 2004, in an extensive 37-page Report and Recommendation, Magistrate Judge Eaton recommended to Southern District Court Judge Daniels that the City Board's motion for summary judgment be granted and petitioner's complaint dismissed (A20-A54).

As to petitioner's Equal Protection claims against the City Board, the Magistrate Judge found that petitioner failed to demonstrate that the City Board's conduct was purposeful in the sense that it intended to discriminate against petitioner (A30-A31). Specifically, the Magistrate Judge found that petitioner's evidence that the City Board deliberately did not provide write-in voting was insufficient (A31-A32). The Magistrate noted that the City Board presented non-discriminatory reasons for its conduct: (1) prior to petitioner, no one had ever objected to the City Board's practice; (2) the City's voting machines purchased in 1959 had various limitations, which Governor George Pataki mentioned in his 2001 Approval Memorandum as valid reasons for the amendments to two sections of the New York Election Law that now provide for write-in votes in contested primaries but permit the City Board to delay counting those votes; and (3) the City Board determined in 1994 that the New York Election Law

regarding write-in voting in primary elections was ambiguous (A32). The Magistrate opined that petitioner's evidence that tended to show that there was a discrepancy between the City and State Board's practices and interpretations of the law was not relevant, since the discrepancy was always known and never in dispute; the evidence needed to show that the discrepancy had a purposeful, discriminatory effect, which petitioner failed to show (A32-A35).

As to petitioner's Due Process claim against the City Board, the Magistrate Judge found that petitioner failed to demonstrate a triable issue of fact that the City Board acted with the intent to deprive him or others of a constitutional right and that there was pervasive unfairness and inadequate state remedies (A42-A43). Rather, the Magistrate found that petitioner only showed that there were "unintended irregularities" as a result of human error, which was insufficient (A42-A43).

In support of its position, the Magistrate Judge noted that the City Board offered the testimony of City Board Commissioner Douglas A. Kellner from the July 10, 2001 trial in *Gelb II*, which testimony demonstrated that, although the City Board eventually determined that its interpretation of the New York Election Law was erroneous, it was, at the time, rational and not designed to deprive anyone the right to vote (A36-A40). The Magistrate Judge found that petitioner did not dispute Kellner's testimony with any documentation or other evidence that tended to show that the City Board acted purposefully: neither a two-page excerpt from a manual describing the design of the City's voting machines nor the fact that paper ballots must be provided under the law when machines were inadequate (A40-A41). With respect to the latter, the Magistrate Judge found that the fact the City did not provide paper ballots did not create an inference of an intentional deprivation of a constitutional right (A41).

In addition, the Magistrate Judge noted that the interpretation of the New York Election Law was a matter of state law and that, in any event, the New York State Court of Appeals declined to rule on the legal correctness of the City Board's new interpretation, now in line with the State Board's (A42). The Magistrate further noted that a 42 U.S.C. section 1983 lawsuit is not a proper forum to adjudicate issues of state law (A42).

Finally, the Magistrate Judge, although unsure if he should take ancillary jurisdiction over petitioner's state-law claims, nonetheless found that petitioner's state-law claims of fraud and *ultra vires* were not actionable (A43-A44). In addition, the Magistrate concluded that petitioner was not entitled to punitive damages, because they are not recoverable against a municipality in a 42 U.S.C. section 1983 lawsuit and, as to the individual defendant Commissioners, petitioner could not recover such damages since he could not show their "evil motive, intent, recklessness or callous indifference" (A44-A45).

(c)

On August 18, 2004, petitioner filed written objections to the Report and Recommendation regarding the denial of his motion for an injunction. In an order dated January 3, 2005 (A17-A19), the Southern District (Daniels, U.S.D.J.) adopted the findings and recommendations of the Magistrate Judge.

On August 25, 2004, petitioner filed written objections to the Report and Recommendation regarding the grant of the City Board's motion for summary judgment. In an order entered January 31, 2005 (A55-A58), the Southern District (Daniels, U.S.D.J.) adopted the findings and recommendations of the Magistrate Judge and dismissed petitioner's complaint in its entirety.

On February 7, 2005, the aforementioned January 31, 2005 order was reduced to a judgment, from which petitioner appealed (A59-A60).

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT'S THOROUGH AND WELL-REASONED DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT IS LEGALLY CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS OR OTHERWISE WARRANTS FURTHER REVIEW BY THIS COURT.

The Second Circuit correctly held that, as to petitioner's equal protection claim, the issue centers on a determination as to whether the actions of the City Board were intentional. The Second Circuit also correctly held that his equal protection claim failed, because he did not demonstrate that the City Board deliberately chose an erroneous interpretation of the New York Election Law for the purpose of discriminating against write-in voters.

However, petitioner erroneously believes that the City Board's intent to deprive him of a constitutional right is reflected by the Second Circuit's earlier 2000 decision in which it certified a question on the interpretation of the New York Election Law to the New York State Court of Appeals. 224 F.3d 149 (Cert. Petition, at p. 13). In so arguing, petitioner refers to the Second Court's *dictum* therein that, because of the City Board's repeated refusals to offer write-in voting in contested primary elections, "it may well be that the Board engaged in" intentional discrimination. However, petitioner misses the mark completely, neglects to read the Second Circuit's statement in the appropriate context and thereby fails to recognize that the Second Circuit was non-committal on the strength of petitioner's claims. In the sentence immediately following that which petitioner cites, the Second Circuit

acknowledged that there was still a possibility that the City Board could obtain summary judgment in its favor—"Although we do not foreclose the possibility of ultimate summary judgment in favor of the City Board . . . ." 224 F.3d at 157. Indeed, that is what eventually properly occurred here.

Moreover, petitioner makes much of the fact that the City Board did not acknowledge its purportedly erroneous interpretation of the New York Election Law regarding write-in voting in contested primary elections until 2001, despite the fact that, in 1995, then District Court Judge Sotomayor, in denying the City Board's abstention motion in *Gelb I*, noted that it appeared that the Election Law was not as ambiguous as the City Board claimed because of the plain language of the various statutes and because of an opinion by the New York State Attorney General. 888 F. Supp. at 517-520 (Cert. Petition, at p. 16). What petitioner fatally chooses to ignore, however, are the following.

First, as the Second Circuit correctly held here, an "[u]neven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination' " (citations omitted). *Powell v. Power*, 436 F.2d 84, 88 (2d Cir., 1970). Petitioner cannot show such intentional or purposeful discrimination.

Second, despite Judge Sotomayor's foregoing analysis, she subsequently acknowledged in her 1996 decision ultimately granting the City Board summary judgment in *Gelb I* that "there is great uncertainty within state law as to whether a write-in option must be provided in a primary election." 950 F. Supp. at 85, n.3.

Third, in August 2000, the Second Circuit certified a question to the New York State Court of Appeals precisely because of that uncertainty, acknowledging that

there was "an absence of authoritative state court interpretations of the election statutes at issue here. . . ." 224 F. 3d at 157-158.

Finally, even when the City Board conceded that it believed its earlier interpretation of the Election Law was incorrect, the New York State Court of Appeals, in February 2001, did not pass on the legal correctness of that view when it declined to answer the Second Circuit's certified question.

Therefore, contrary to petitioner's contentions, in light of the ambiguity in the Election Law recognized by the Second Circuit and the District Court, and the lack of any ruling on the City Board's interpretation of the law by the New York State Court of Appeals, it cannot be said that the City Board's interpretation of the write-in provisions of the Election Law pertaining to primary elections prior to 2001 was arbitrary, irrational and undertaken with the intent to discriminate against petitioner.

Finally, in light of the foregoing demonstrating that petitioner could not demonstrate intentional discrimination, the Second Circuit properly affirmed the denial of petitioner's claim for injunctive relief. Petitioner could not demonstrate irreparable harm and a likelihood of success on the merits of his lawsuit against the City Board.

Therefore, the Second Circuit's cogent rejection of petitioner's equal protection and due process claims is correct in all respects and does not raise any issues warranting further review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
March 28, 2006

Respectfully submitted,

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No. 05 - 1161

In The
Supreme Court of the United States

IRVING A. GELB,

Petitioner

v.

The New York City Board of Elections, et al

and

The New York State Board of Elections, et al

Respondents

On Petition for Writ Of Certiorari
To The Second Circuit Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Second Circuit should not be allowed to stand, because it incorrectly affirms the District Court opinion that relied Magistrate's Report and Recommendation which, among other things, failed to address the "color of law" issue at the core of this 42 § 1983 complaint. The decision of the Second Circuit conflicts with several of this Court's decisions.

There are two sets of respondents. We will address the issues concerning the New York City Board of Elections and its commissioners (the "City Board") in Part A, below and the issues concerning the New York State Board of Elections and its commissioners (the "State Board") in Part B, below.

Part A: THE CITY BOARD

I. THE COURT SHOULD CLARIFY THE STANDARD FOR DETERMINING AN EQUAL PROTECTION VIOLATION.

In denying petitioner's Equal Protection claim, the Second Circuit states:

> "Uneven or erroneous application of an otherwise valid statute constitutes a denial of equal protection only if it represents 'intentional or purposeful discrimination.'" *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) (quoting *Snowden v. Hughes*, 321 U.S. 1,8 (1944). (A3)

While *Powell* provides one criteria for determining an equal protection violation, it is not the only criteria.

In *EVANS v. CORNMAN*, 398 U.S. 419, (1970), this

Court has disallowed voting distinctions based upon various classifications including geography.

It can be shown that in the contested September 2000 Democratic Primary for U.S. Senator, the City Board knew that all petitions for statewide primaries are filed with the State Board and not with the City Board and the City Board knew that in the primary in question, the State Board did not require an opportunity to ballot petition prior to permitting write-in voting. The City Board had no legal authority to insist that an opportunity to ballot petition needed to be filed before write-in voting can be offered in that primary.

This Court needs to determine whether an equal protection violation has occurred in the contested September 2000 Democratic Primary for U.S. Senator when voters outside New York City were permitted to vote by write-in while voters within New York City were not. And whether an equal protection violation has occurred when petitioner was permitted to run as a write-in candidate in the contested September 2000 Democratic Primary for U.S. Senator in districts outsaide of New York City while being denied that right within New York City.

II. THE COURT SHOULD CLARIFY THE STANDARD FOR DETERMINING WHETHER DAMAGES ARE RECOVERABLE AGAINST MUNICIPALITIES AND PUBLIC OFFICIALS FOR VIOLATIONS COMMITTED UNDER 42 § 1983

On page 13, Respondent City Board says

> "the Magistrate opined that petitioner's evidence that tended to show that there was a discrepency between the City and State Board's practices and interpretations of the law was not relevant, since the discrepancy was always known and never in dispute;

the evidence needed to show that the discrepency had a purposful, discriminatory effect, which petitioner failed to show (A32-A35)."

The Court misapprehends the significance of the evidence.

It is precisley because the discrepency between the City and State Board's practices and interpretations of the law was always known and not in dispute, that the evidence shows that the discrepency had a purposful, discriminatory effect. By saying that the discrepancy was always known and not in dispute, the Court is saying that at the time I initiated my action, the City Board knew that all petitions for the September 2000 Democratic Primary for U.S. Senator were filed with the State Board and they also knew that the State Board did not require the opportunity to ballot petition the City Board insisted was necessary.

An *Ultra Vires* act of a municipality is one which is beyond the powers conferred upon it by law. *Charles v. Town of Jeanette, Inc.* La. App., 234 So 2d 794,798. The City Board had no legal authority to make any determination regarding write-in voting in a statewide primary. Clearly, the City Board was acting under color of law.

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 Sup.Ct. 2018 (1978), the Supreme Court found that municipalities and public officials can be held accountable under 42 § 1983 for constitutional rights violations resulting from the department's official policy. In my case, my right to participate in the September 2000 Democratic Primary for U.S. Senate as a write-in candidate and a write-in voter were violated by the official policy set by both the City Board with its commissioners and the State Board with its commissioners.

In *Pembaur v. City of Cincinnati,* 106 Sup.Ct. 1292, 1300 (1986), the Supreme Court found that liability under 42 §

1983 could be imposed on officials who were responsible for establishing the "final" official policy with respect to the activity in question. The Court noted that municipal liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question. *Pembaur* is also significant because it shows that liability can attach to even a single decision to take unlawful action in accordance with official policy set by even a single policy maker.

REASONS FOR GRANTING PETITION

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT WARRANTS REVIEW BY THIS COURT BECAUSE IT CONFLICTS WITH DECISIONS BY THIS COURT AND OTHER APPEALS COURT DECISIONS.

(a)

In *Williams v. Salerno*, 792 F.2d. 323, 326 (2d Cir. 1986), the Second Circuit had found that irreparable harm is established if a party is deprived of the right to vote (noting that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon"). In addition to having been denied my legal right to vote by write-in, we were also denied our right to participate as a candidate. While the defendants admitted, in 2001, that their interpretation of relevant election law had been wrong for over 40 years, the harm had been done and cannot be undone.

In *Monell*, the Supreme Court found that municipalities and public officials can be held accountable under 42 § 1983 for constitutional rights violations resulting from the

department's official policy.

In *Pembaur*, the Supreme Court found that liability under 42 § 1983 could be imposed on officials who were responsible for establishing the "final" official policy with respect to the activity in question.

(b)

On page 15 of City Respondents' Brief, in discussing the Second circuit's earlier 2000, respondents implies that petitioner misunderstood the import of that decision. They state

> "In the sentence immediately following that which petitioner cites, the Second Circuit acknowledged that there was still a possibility that the City Board could obtain summary judgment in its favor--- 'Although we do not forclose the possibility of ultimate summary judgment in favor of the City Board....' 224 F.3d at 157. Indeed, that is what eventually properly occurred here."

The concluding sentance in the statement above is false and misleading. This can be seen by simply turning to City Respondents' Brief, page 9. There, in a short discussion of the sequence of events following New York State Court of Appeals declining to answer the certified question from the Second Circuit, respondents state:

> "...the Second Circuit vacated the District Court's grant of summary judgment and remanded the matter for the District Court to determine whether the City Board engaged in 'intentional or purposeful discrimination.' 7 Fed. Appx. 97, 2001 U.S. App. LEXIS 5647(2001)."
>
> "Upon remand, the matter proceeded to trial on July 10 and July 11, 2001, which resulted in a jury verdict in favor of the City Board. 47 Fed. Appx. 10, 2002

U.S. App. LEXIS 18688 at *2. The jury found that petitioner failed to prove that the City Board had intentionally discriminated against him by not offering write-in voting in the September 1997 Democratic Party primary election."

The significance here, is not that I lost the trial, but rather that we were permitted, contrary to City Respondents' statement on page 15, to proceed to trial. Clearly, my current action is stronger than my earlier action because I can now show that City Board respondents had no right to make even an erroneous determination. We feel that our current action should likewise be allowed to proceed to trial.

(c)

City respondents, on page 17, continue to try to confuse the issue by claiming that even though they admitted in 2001 that their interpretation of relevant election law had been wrong for over 40 years, the issue remains ambiguous because the New York State Court of Appeals declined to answer the certified question sent by the Second Circuit. They claim that absent a ruling from the State Court of Appeals,

"...it cannot be said that the City Board's interpretation of the write-in provisions of the Election Law pertaining to primary elections prior to the 2001 was arbitrary, irrational and undertaken with the intent to discriminate against petitioner."

They are wrong.

The New York State Court of Appeals would have been remiss in its judicial duties had they declined to address the certified question if an answer were not available. We suggest a simpler explanation. When the City Board admitted its position was wrong, the question simply became moot. A

question is "moot" when it presents no actual controversy or when the issues have ceased to exist. *Matter of Lawson Estate*, 41 Ill.App.3d 37, 353 N.E. 2d 345, 347.

It can be shown that the City Board's interpretation of the write-in provisions of the Election Law pertaining to the primary election for U.S. Senate in 2000 was arbitrary, irrational and undertaken with the intent to discriminate against petitioner because it can be shown that they had no authority to make any determination at least in that primary election.

Further, when the respondents state, on page 17, that "Petitioner could not irreparable harm and a likelihood of success on the merits of his lawsuit against the City Board." They are wrong again. As we previously pointed out, the Second Circuit had already set the standard for irreparable harm when in *Williams v. Salerno*, 792 F.2d. 323, 326 (2d Cir. 1986), the Second Circuit had found that irreparable harm is established if a party is deprived of the right to vote (noting that the plaintiffs "would certainly suffer irreparable harm if their right to vote were impinged upon").

Clearly, further review by this Court is warranted.

Part B: THE STATE BOARD

It is not repeat all the arguments in our Petition for Writ of Certiorari as relates to the State Board. We are however, compelled to point out that the State Board has admitted that they are obligated to administer primary elections for statewide office. And they have admitted that they did not require an opportunity to ballot petition before providing write-in voting in contested statewide primaries.

We conceded only that the State is immune from damages because actions against the State Board for monetary damages

are barred under the Eleventh Amendment. *See Feingold v. New York*, 366 F.3d 138, 149(2d Cir.)"

The Commissioners, however, have no immunity because they were not acting on behalf of the State when under color of law, they supported the right of the City Board to interpret the relevant Election Law differently from the State Board in a statewide primary.

State officials can be sued for damages when acting in their "official capacity."*Hafer v. Melo* 112 Sup. Ct. 358 (1991) Further, in *Pembaur,* liability under Section 1983 attaches when a deliberate choice to follow a course of action is made from among from various alternatives by the officials responsible for setting final policy with respect to the subject matter in question.

CONCLUSION

The petition for a writ of certiorari should be granted.

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April 7, 2006